SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 735.

THE CHEROKEE NATION AND THE UNITED STATES, APPELLANTS,

vs.

MOSES WHITMIRE, TRUSTEE FOR THE FREEDMEN OF THE CHEROKEE NATION.

APPEAL FROM THE COURT OF CLAIMS.

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1 *Petition. Filed September 26, 1891.*

United States of America. In the Court of Claims.

MOSES WHITMIRE, TRUSTEE FOR THE FREEDMEN OF THE Cherokee Nation, plaintiff,
vs.
THE CHEROKEE NATION AND THE UNITED STATES OF America, defendants. } No. 17,209.

Filed September 26, 1891.

The plaintiff, Moses Whitmire, trustee for the freedmen of the Cherokee Nation, suing as the trustee for the freedmen of the Cherokee Nation, by virtue of and under the authority of an act of Congress entitled "An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes, approved October 1st, 1890," complains of the said Cherokee Nation and the United States of America, and states:

1. That under and by virtue of the said act of Congress he was selected by the freedmen of the Cherokee Nation in their behalf and for their use, and in his name as their trustee, to institute the suit or suits authorized and provided for by said act of Con-
2 gress, and that after his said selection by said Cherokee freedmen on the 7th day of January, 1891, his selection was duly approved by the Secretary of the Interior of the United States, as provided for and required by said act of Congress, and that said plaintiff has accepted said trust, and in conformity with the requirements thereof institutes and prosecutes this suit. That a true copy of said act of Congress is annexed to this petition and marked "Exhibit A" and made part hereof.

2. Plaintiff also states that prior to the 6th day of May, 1828, the Cherokee Nation of Indians had separated into two portions; that one portion continued to reside east of the Mississippi River, on a portion of the lands held and occupied by the tribe before the separation, and thenceforth were known as the East Cherokees, and the other portion, known as the West Cherokees, had, under the sanction of the United States of America and by virtue of a treaty dated July 8th, 1817, settled upon lands within the present limits of the State of Arkansas. That thereafter, by the terms of articles of convention and treaty between the West Cherokees and the United States of America, concluded May 6, 1828, the United States agreed to possess the West Cherokees and to guarantee to them forever seven millions of acres of land, bounded as follows, to wit:

Commencing at that point on the Arkansas River where the eastern Choctaw boundary line strikes said river and running thence with the western line of Arkansas to the southwest corner of Missouri; thence with the western boundary line of Missouri across the waters

of the Grand River; thence due west to a point on which a due south course would strike the present northwest corner of Arkansas Territory; thence continuing due south on and with the present western boundary line of the territory to the main branch of the Arkansas River; thence down said river to its junction with the Canadian River, and thence up and between said rivers Arkansas and Canadian to a point at which a line running north and south from river to river would give the aforesaid seven millions of acres. And in addition to the seven millions of acres thus provided for and
3 bounded, the United States did further guarantee to the Cherokee Nation a perpetual outlet west, and the free and unmolested use of all the country lying west of the western boundary of the above-described limits and as far west as the sovereignty of the United States and their right of soil did then extend, which was to the present western boundary line of the Indian Territory. That the said first described tract of seven million acres of land was known as the Cherokee Reservation and the additional land lying west became and thenceforth was known as the Cherokee Outlet; that the West Cherokees, called the Cherokee Nation in said treaty, took possession of substantially all of said Cherokee Reservation and began to use and since has used the said tract known as the Cherokee Outlet; that afterwards, to wit, on the 14th day of February, 1833, by articles of agreement and convention concluded at Fort Gibson between the United States of America and the West Cherokee Nation, it was recited there had arisen a dispute between the Creek tribe of Indians and the Cherokee Indians as to a portion of the land included in said Cherokee Reservation, and that the United States agreed to possess the Cherokees and to guarantee to them forever, and that guarantee was solemnly pledged for seven millions of acres of land, bounded as follows, to wit:

Beginning at a point on the old western Territorial line of Arkansas Territory, being twenty-five miles north from the point where the Territorial line crosses Arkansas River, thence running from said north point south on the said Territorial line to the place where said Territorial line crosses the Verdigris River; thence down said Verdigris River to the Arkansas River; thence down said Arkansas to a point where a stone is placed opposite to the east or lower bank of Grand River at its junction with the Arkansas; thence running south, forty-four degrees west, one mile; thence in a straight line to a point four miles northerly from the mouth of the north fork of the Canadian; thence along the said four miles line to the Canadian; thence down the Canadian to the Arkansas; thence down the Arkansas to that point on the Arkansas where the eastern Choctaw boundary strikes said river, and running thence with the western line of Arkan-
4 sas Territory, as now defined, to the southwest corner of Missouri; thence along the western Missouri line to the land assigned the Senecas; thence on the south line of the Senecas to Grand River; thence up said Grand River as far as the south line of the

Osage Reservation, extended, if necessary; thence up and between said south Osage line, extended west, if necessary, and a line drawn due west from the point of beginning to a certain distance west, at which a line running north and south from said Osage line to said due west line will make seven millions of acres within the whole described boundaries. In addition to the seven millions of acres of land thus provided for and bounded, the United States further did guarantee to the Cherokee Nation a perpetual outlet west and a free and unmolested use of all the country lying west of the western boundary of said seven millions of acres as far west as the sovereignty of the United States and their right of soil extended: Provided, however, that if the saline or salt plain on the great western prairie should fall within said limits prescribed for said Outlet the right was reserved to the United States to permit other tribes of red men to get salt on said plain in common with the Cherokees, and that letters patent should be issued by the United States as soon as practicable for the land thereby guaranteed.

That thereafter the said seven millions of acres of land became and was used, occupied, and possessed by the said West Cherokee Nation, and was known and described as the Cherokee Reservation; and the said additional tract of land lying west of said reservation was thenceforth used by the said West Cherokee Nation, and continued to be known as the Cherokee Outlet.

That, afterwards, by the provisions and terms of the articles of a treaty known as the New Echota treaty, concluded on the 29th day of December, 1835, between the United States of America and the East and West Cherokees, it was provided, among other things, that the Cherokees should and did relinquish to the United States of America all of their lands lying east of the Mississippi River, and that those members of the East Cherokee Nation who chose to emigrate were to settle upon the said Cherokee Reservation described in the convention of February 14, 1833, aforesaid, and the United States of America agreed that the lands ceded in said last named treaty, including both reservation and outlet and additional lands ceded by the New Echota treaty should be included in one patent, to be executed to the Cherokee Nation of Indians by the President of the United States, according to the provisions of the act of Congress of May 28, 1830, and it was further agreed that the United States of America should convey to the Cherokee Nation and their descendants by patent in fee simple, as additional lands, a tract of land, situated between the west line of the State of Missouri at the southeast corner of the same, and running north along the east line of the Osage lands, fifty miles to the northeast corner thereof, and thence east to the west line of the State of Missouri; thence with said line south fifty miles; thence west to the place of beginning, and estimated to contain eight hundred thousand acres of land; excepting any land assigned to the Quapaws falling within said bounds; that the consideration for said last named grant was five hundred thousand dollars, which was paid by the Cherokee Nation to the United States

of America. That under the terms, and in pursuance of the said treaty of New Echota, a large portion of the Eastern Cherokees removed to and settled upon said Cherokee Reservation and the said additional tract of eight hundred thousand acres, and thenceforward used and occupied the same, together with said Cherokee Outlet, in common with the Western Cherokees, and that by virtue of such emigration and settlement, the Eastern Cherokees became extinct as a nation, and the Eastern and Western Cherokees amalgamated and consolidated and thenceforth became and were known as the Cherokee Nation, and said additional tract of eight hundred thousand acres so purchased was thenceforward included in the tract designated as the Cherokee Reservation. That under and by virtue of the treaty between the Cherokee Nation and the United States of America, on the 6th day of August, A. D. 1846, proclaimed August 17, 1846, it was agreed, among other things, that the lands then occupied by the Cherokee Nation should be secured to the whole of the Cherokee people for their common use and benefit, and a patent should be issued for the same by the United States of America, including the eight hundred thousand acres purchased, and the outlet west promised by the United States, in conformity with the provisions relating thereto, contained in the third article of the treaty of New Echota and in the third section of the act of Congress, approved May 28, 1830; provided always that such lands should revert to the United States if the Indians should become extinct or abandon the same. That at the time of said treaty of August 6, 1846 the Cherokee Nation occupied the tract known as the Cherokee Reservation, including the eight hundred thousand acres added thereto, by purchase under the provisions of the treaty of December 29, 1835, and used and occupied the said Cherokee Outlet.

That, as of the 31st day of December, 1838, letters patent of the United States issued to the said Cherokee Nation for the tract known as the Cherokee Reservation, including said eight hundred thousand acres addition thereto, and the said Cherokee Outlet, said letters patent purporting to convey 13,574,153 and 14-100 acres, and also the additional eight hundred thousand acres sold to the said Cherokees under and by virtue of the said treaty of New Echota; that various portions of said reservation and outlet have been sold and conveyed by the said Cherokee Nation to various persons, and that the Cherokee Nation is now the owner and seized in fee simple of the said remainder of said Cherokee Reservation, and that after deducting the lands so sold and conveyed therefrom by the said Cherokee Nation, the said Cherokee Reservation now contains and includes 5,031,353 acres; that said Cherokee Nation is also the owner of the said outlet, which contained and included in lands lying west of the Arkansas River, 6,574,486 acres, out of which have been assigned to the Pawnee, Otoes, Missourias, Poncas, and Tonkawas 551,732 acres, so that the Cherokee Outlet now comprises 6,022,754 acres.

That during the War of the Rebellion a large number of the Cherokee Nation actively sympathized with the so-called Confederate

States, and joined the Confederate armies and committed acts
7 of open hostility against the United States and various citizens thereof, and that the Cherokee Nation entered into an alleged treaty or alliance with the said so-called Confederate States and assisted the same in the rebellion, and by laws enacted by the Cherokee council the homes of such rebellious and hostile members of the tribe were confiscated and sold; and that under and by virtue of a treaty made and concluded between the United States of America and the Cherokee Nation of Indians on the 19th day of July, 1866, and duly ratified as amended, and proclaimed August 11, 1866, it was recited that the existing treaties between the United States and the Cherokee Nation were insufficient, and it was stipulated and declared by the parties thereto that a pretended treaty made between the Cherokee Nation and the so-called Confederate States of America, on the 7th day of October, 1861, was declared to be void; all such acts of rebellion on the part of the Cherokees were pardoned and forgiven by the United States, the confiscation laws of the Cherokee Nation were repealed, and all sales of farms and improvements in pursuance thereof declared to be null and void, and the former owners of the confiscated property, their heirs or assigns, were given the right to reoccupy their homes, and the purchasers, under the confiscation laws, were to be repaid by the treasurer of the Cherokee Nation from their national funds the money paid by them for such property and the cost of improvements; and Cherokees and freed persons who were formerly slaves to any Cherokee, and all freed negroes not having been such slaves, who resided in the Cherokee Nation prior to June 1, A. D. 1861, were given the right, if they desired, to settle in and occupy a certain portion of the Cherokee Reservation, and control their local affairs and elect their officers and judges, and establish the necessary police regulations and rules for the administration of justice in said district, not inconsistent with the constitution of the Cherokee Nation or the laws of the United States, with provisions, however, that the Cherokees residing in such districts should enjoy all the rights and privileges of other Cherokees who
had elected to settle in said district, as provided, and should
8 have the same rights and privileges and be subject to the same liabilities as those who should elect to settle in said district, under the provisions of this treaty, and that the inhabitants of said districts should be entitled to representation in the national council, and it was further provided by article nine of said treaty that the Cherokee Nation having voluntarily in February, 1863, by act of their national council, forever abolished slavery, did in said treaty covenant and agree that never thereafter should either slavery or involuntary servitude exist in their nation, otherwise than in the punishment of crime, whereof the party should have been duly convicted, in accordance with laws applicable to all the members of said tribe alike, and the said Cherokee Nation in and by said last-named treaty did further agree that all freedmen who had been liberated by voluntary act of their former owners, or by law, as well as all free

colored persons who were in the country, meaning the country of the Cherokee Nation, at the commencement of the rebellion, and were at the time of said treaty residents therein, or who might return within six months thereafter, and their descendants, should have all the rights of native Cherokees, with the provision, however, that the owners of slaves so emancipated in the Cherokee Nation should never receive any compensation or pay for slaves so emancipated.

That prior to the time of the conclusion and ratification of said treaty last named a large number of the Cherokees had been the owners of negro slaves, and there had been resident freedmen settled in the nation. That the freedmen referred to, and the persons referred to in said treaty as having been liberated by voluntary act of their former owners and by law, and the free colored persons in the country at the commencement of the rebellion and residents therein at the time of the treaty, or who should return within six months, and their descendants constitute and are the body of persons known and described as the freedmen of the Cherokee Nation and mentioned and referred to in the said act of Congress passed on the said 1st day of October, 1890, and entitled "An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the
9 freedmen of the Cherokee Nation, and for other purposes," and are the beneficiaries of this action, and the persons by whom this plaintiff was selected trustee, under the provisions of said act of Congress, and that the persons and their descendants known as the Cherokee freedmen and mentioned, designated, and described in said article nine of said treaty of July 19, 1866, and who were by virtue of said treaty vested with all the rights of native Cherokees, now number seven thousand souls, and the native Cherokees now number sixteen thousand souls.

3. Plaintiff shows that the said freedmen of the Cherokee Nation, since the said 19th day of July, 1866, by virtue of the treaty of that date, have become vested with the right to share in the lands and the interests of the Cherokee Nation therein, at that date, and since then owned by the Cherokee Nation, or in which the Cherokee Nation was, since has been, and now is interested and vested in the proportion which the number of the freedmen of the Cherokee Nation bears to the entire number of native Cherokees and Cherokee freedmen of the Cherokee Nation; and that the said freedmen of the Cherokee Nation, by virtue of the said treaty, thereupon became, and thence continued to be and now are, tenants in common with native Cherokees of all the said lands, rights, and interests of every nature and kind therein then owned by the Cherokee Nation or in which the same has since been or now is interested, and especially have the said freedmen of the Cherokee Nation become tenants in common and jointly interested with native Cherokees as members of the Cherokee Nation, and to the same extent as though they were native Cherokees by blood, in the said lands known as the Cherokee Reservation and Cherokee Outlet, including said eight hundred thousand additional acres ceded by the treaty of August 6, A. D. 1846, aforesaid, and the proceeds thereof.

That said Cherokee Nation, by its national council and otherwise, has denied and refused, and still does deny and refuse, any right, title, and interest of the said freedmen of the Cherokee Nation in and to said Cherokee Reservation and Cherokee Outlet.

10 Plaintiff, therefore, prays for the decree and judgment of this court establishing the said proportionate right, interest, title, and share of said freedmen of the Cherokee Nation in the said lands now known as the Cherokee Reservation, and in the said lands now known as the Cherokee Outlet, and that the said freedmen of the Cherokee Nation may be found and decreed to be seized of and to have and enjoy proportionate rights, interests, titles, and shares in all of said last named lands, known as the said Cherokee Reservation and the said Cherokee Outlet, and the interest of the Cherokee Nation therein.

4. Plaintiff further states that under and by virtue of the said treaty of New Echota, dated December 29, 1835, it was, among other things, provided that the United States of America should pay to the Cherokee Indians for all their lands and possessions east of the Mississippi River, and in consideration of claims for spoliations, the sum of $5,300,000, certain portions of which were to be invested by the President of the United States in some safe and most productive public stocks of the country, for the benefit of the whole Cherokee Nation who had removed or should remove to the lands assigned by that treaty to the Cherokee Nation west of the Mississippi River, and that large sums were so invested, and that said investments of said moneys, sums, and funds in said stocks now held by the said United States of America are now as follows:

Cherokee national fund	$543,638.56
School fund	62,824.28
Orphan fund	22,223.26
National fund abstracted bonds	68,000.00
School fund abstracted bonds	15,000.00

Producing annual income of $41,112.97.

And the plaintiff shows that said principal stocks and funds have so been in the United States Treasury to the credit of the Cherokee Nation, producing said annual income aforesaid, since the 11th day of August, 1866.

11 And that under and by virtue of the terms of said treaty of July 19, 1866, the said freedmen of the Cherokee Nation became and are and since have been entitled to a pro rata share and interest in the said trust, stocks, and funds last named and to a pro rata share in the income and benefits arising therefrom; but that the said Cherokee Nation and its national council has heretofore and still does refuse the said freedmen of the Cherokee Nation participation in the said trust, stocks, and funds and interests and the income accruing and the benefits arising therefrom, and has denied and still does deny that the freedmen of the Cherokee Nation have any right, title, or interest therein or thereto.

Plaintiff therefore prays the decree and judgment of this court determining and establishing the said interest, right, and title of said freedmen of the Cherokee Nation in and to said trust, stocks, and funds and the income accruing therefrom and the benefits connected therewith, and for the recovery and enforcement of such right and interest when so established.

5. Plaintiff further shows that there is now in the United States Treasury, and has been since A. D. 1870, the following sums of money in trust for the Cherokee Nation:

Cherokee asylum fund	$796,510.90
Cherokee orphan fund	337,456.05
Cherokee school fund	732,416.81

Which has produced an annual income, annually paid to the treasurer of the Cherokee Nation, of $96,516.56, and which said money and funds were derived from the sale of the property or rights owned by the Cherokee Nation, and in which and the income of which the said freedmen of the Cherokee Nation, by virtue of said treaty of July 19th, 1866, are entitled to a per capita share as though native Cherokees; that said Cherokee Nation and the national council thereof have denied and still do deny the right of the said freedmen of the Cherokee Nation to any share or part of the same or to any participation in the said income derived from the same.

12 Plaintiff therefore prays the decree and judgment of this court determining and establishing the said interest and right of said freedmen of the Cherokee Nation in and to said trust, moneys, and funds and the income arising and accruing therefrom and the benefits connected therewith, and for the recovery and enforcement of such right and interest when so established.

6. Plaintiff further states that the said Cherokee Nation did receive into its national treasury, from on or about the 5th day of July, A. D. 1883, to on or about the 1st day of October, 1888, the further sum of $1,000,000, being rent or royalty paid by certain persons or corporations for grazing and raising cattle on lands, which were common property of said Cherokee Nation, west of 96 degrees west longitude, and which were a part and parcel of said Cherokee Outlet aforesaid, then owned by said Cherokee Nation, in which sum the said Cherokee freedmen were entitled to the same participation and distribution as the Cherokees by blood; but disregarding the rights of said Cherokee freedmen said Cherokee Nation withheld from them and refused to pay to them their legal shares and proportions of said last named fund, or any portion thereof, and still withholds the same, and has distributed the same in whole or in part to the Cherokees by blood only, and that the share and interest of said freedmen in said fund is the sum of two hundred and forty-five thousand dollars; for which sum plaintiff also asks judgment against said Cherokee Nation, and with interest thereon at the rate of six per cent per annum.

7. Plaintiff further shows and avers that the Cherokee Nation did, by virtue of an act of Congress approved March 3, 1881, receive into

its national treasury the sum of $48,389.46 as part payment for certain lands assigned to the Ponca Indians out of said lands owned by the Cherokee Nation, being a tract of 101,899 acres, part and parcel of the lands of the said tract known as the Cherokee Outlet, and that the Cherokee freedmen are entitled, by virtue of the terms of said treaty of July 19, 1866, to the same per capita share and interest in said sum as the native Cherokees; that the sum and share of the said freemen of the Cherokee Nation therein amounts to
13 twenty-four thousand dollars; but the said Cherokee Nation has neglected and refuses and still does neglect and refuse to pay the same or any part thereof to the said Cherokee freedmen.

Plaintiff therefore asks judgment against said Cherokee Nation for said sum last named, with interest at six per cent per annum from the 3d day of March, 1881.

8. The plaintiff shows, states, and alleges that the Cherokee Nation on or about July 19, 1880, did receive into its national treasury the further sum of $300,000, being an amount appropriated by an act of Congress approved June 16, 1880, to be paid into the treasury of the Cherokee Nation out of funds due said nation for certain lands owned by said Cherokee Nation lying west of the Arkansas River and west of 96 degrees west longitude, and being a portion of the said tract known as the Cherokee Outlet; and that of said sum the Cherokee freedmen are entitled to have and receive the sum of one hundred and forty thousand dollars, being the aggregate of the per capita share and interest of said freedmen of the Cherokee Nation therein. But the Cherokee Nation, disregarding its obligaiton under said treaty, wrongfully denies said right and unlawfully withholds the said sum, and has neglected and refused to pay the same or any part thereof to the said Cherokee freedmen; wherefore plaintiff also asks judgment against said Cherokee Nation for the said sum of one hundred and forty thousand dollars, with interest thereon at six per cent per annum from June 16, 1880.

9. The said plaintiff further shows that the said Cherokee Nation, under and pursuant to the sixteenth article of said treaty between the United States of America and the Cherokee Nation, made July 19, 1866, and the provisions of the act of Congress approved June 5, 1872, sold to the Osage Indians a tract of land of 1,570,196 acres from the said Cherokee Reservation, being a part of the common property of the Cherokee Nation lying east of the land of 96 degrees west longitude, for the aggregate sum of $1,099,137.41, which land was conveyed by said Cherokee Nation to the United States of America in trust for the benefit of the Osage and Kansas Indians by
14 deed dated July 14, 1883; that said sum of $1,099,137.41 the United States holds as trustee for said Cherokee Nation; that the said Cherokee freedmen, under and by virtue of said treaty of July 19, 1866, became entitled to share on equal terms per capita in every respect with native Cherokees in the moneys, lands, and rights of said Cherokee Nation, and became and were entitled to an equal per capita share and portion of the said last-named trust fund with

native Cherokees; that the right, share and interest of the said Cherokee freedmen in gross in and to said last-named trust fund is five hundred thousand dollars, which said sum and the annual interest thereon the said Cherokee Nation wholly neglects and refuses to pay to the Freedmen of the Cherokee Nation, and denies the right of said freedmen of the Cherokee Nation to any interest or right therein.

Plaintiff asks for the decree of the court establishing the aforesaid right, share and interest of the said freedmen of the Cherokee Nation in and to said last-named trust fund and for the recovery and enforcement of said right and interest.

10. Plaintiff further shows and avers that the said Cherokee Nation, by its national council and principal chief, about July 5, 1888, leased the land belonging to said nation, lying west of 96 degrees west longitude, being the Cherokee Outlet aforesaid, to a certain cattle association for a term of five years for grazing purposes, at an annual rental of $200,000 per annum, and has received into its national treasury, on account of said rent, the sum of $300,000, which sum the Cherokee freedmen are entitled, by virtue of said treaty, to share equally with the native Cherokees; but the said Cherokee Nation refuses and neglects to pay to the said Cherokee freedmen any portion of said last named fund; and denies the said right of said freedmen of the Cherokee Nation; and plaintiff avers that the share and interest of the said Cherokee freedmen in said last-named fund, and the amount to which they are entitled, is the sum of one hundred and forty thousand dollars, for which sum plaintiff also asks judgment against said Cherokee Nation, with legal interest thereon.

11. The said plaintiff further states that a large portion of the lands now included in said Cherokee Reservation are not used or occupied by any part of the individuals of said Cherokee Tribe, and are suitable and fit for grazing purposes and for raising and maintaining cattle, and that since the 1st day of January, A. D. 1880, at various times, the Cherokee Nation has leased various portions of said unoccupied lands in the Cherokee Reservation to various persons, firms, and corporations for the purpose of grazing and of raising and maintaining cattle thereon, which said persons, firms, and corporations have used and occupied the said portions of said unoccupied lands for the purposes aforesaid, and have paid, from time to time, large sums of money as rental therefor into the treasury of the Cherokee Nation, and the same appear from the records thereof. That plaintiff is not able to state the exact amount or amounts of said moneys so paid into the treasury of the Cherokee Nation as rental for said last named lands, and has applied to the treasurer of the Cherokee Nation for permission to inspect the said records for the purpose of ascertaining such amounts; but that said treasurer has refused permission to plaintiff to make such inspection, and that the amounts so realized and paid into the treasury of the Cherokee Nation as rental of said last named lands cannot be ascertained from any other source than the aforesaid records. Plaintiff states, however, that he is informed, and believes, that the aggre-

gate sum of said rentals paid into the treasury of the Cherokee Nation during said period is five millions of dollars. That under and by virtue of the terms of said treaty of July 19, 1866, the Cherokee freedmen are entitled to a per capita share and the interest in said last named moneys and funds; but that the Cherokee Nation, by its national council, has, from time to time, appropriated and distributed said funds among the individual members of said Cherokee Nation, who are Cherokees by blood, and has entirely omitted the freedmen of the Cherokee Nation in said appropriations and distributions, and has wholly failed and neglected to pay, or caused to be paid, to the said freedmen of the Cherokee Nation, or any
16 or either of them, any part or portion of the said moneys and funds realized as rentals form said last named lands of the Cherokee Reservation, and denies the right of said freedmen of the Cherokee Nation thereto. Therefore plaintiff demands an accounting with the said Cherokee Nation as to the moneys and funds realized as rental from the said lands of the Cherokee Reservation last named, and for judgment for the amount and proportionate share which shall be found due and owing from said Cherokee Nation to said freedmen of the Cherokee Nation, and said amount plaintiff states is $2,250,000.

12. Plaintiff further shows that a large portion of said lands included in the Cherokee Reservation and the eight hundred thousand additional acres ceded to the Cherokee Nation by the United States of America, under and by virtue of said treaty of February 14, 1833, and by the terms of the treaty of December 29, 1835, became and were afterwards known as the Cherokee neutral lands, and that a portion of same, amounting to 154,395 acres, were, on or about the 19th day of July, 1866, under and by virtue of the provisions of said treaty of that date, acquired by the United States of America from the Cherokee Nation, and by the United States declared to be public lands, to be sold by the United States, and the funds derived from the sale thereof to be held by the United States in trust and paid over to the said Cherokee Nation. That said tract of land last named contained 154,395 acres, and that the same has been sold by the United States to various persons, firms, and corporations, and the net proceeds of the sale, amounting to $808,162.74, have been, by the United States of America, expended in the purchase of United States bonds to the amount of $731,593.87, and the same are held by the United States in trust for the Cherokee Nation.

That under and by virtue of the terms of said treaty of July 19. 1866, the freedmen of the Cherokee Nation were entitled to participate in said funds realized from the sale of said lands known as the Cherokee neutral strip, but that the Cherokee Nation, by its national council, has denied and still does deny the said right of the said freedmen of the Cherokee Nation to said funds and the interest thereon.

17 Plaintiff th'refore prays the judgment and decree of this court, determining and establishing the right and interest of

the freedmen of the Cherokee Nation in and to said last named trust, bonds, and funds, and for the recovery and enforcement of said right and interest when so established.

13. Plaintiff further states that during the years A. D. 1880 and A. D. 1881, A. D. 1882 and A. D. 1883, up to October 1st of said last named year, the said Cherokee Nation leased to various persons, firms, and corporations, for the purpose of grazing and raising cattle thereon, certain portions of the territory known as the Cherokee Outlet, lying west of 96 degrees west longitude, and received therefor certain sums of money as follows, to wit:

A. D. 1880, amount collected and carried to bread fund of 1880, per act of December 10, 1880	$7,620.00
A. D. 1881, amount collected, $21,555.64, and transferred to indigent fund, as per acts of appropriation, December 12, 1881, cash	19,082.64
1882, amount collected, $41,233.81, and transferred to general fund, as per act of December 16, 1882, amount in cash	37,412.55
1883, amount collected, $10,742.64, over and above the $50,000 lease money, carried to general fund, in cash	10,442.64
Total	$74,557.83

Which said last named sums plaintiff states were actually paid into the treasury of the Cherokee Nation and by said Cherokee Nation wrongfully used, applied, distributed, and appropriated for the sole and exclusive benefit and use of Cherokees by blood only, and in which use, benefit, and participation the said freedmen of the Cherokee Nation were, by the said Cherokee Nation and its national council, wholly excluded. Wherefore plaintiff asks judgment for the said sum of $32,612.05, with interest at the rate of 6 per cent. per annum on said respective amounts from the dates of collection as aforesaid.

18 15. Plaintiff further shows that the United States also holds in its possession and control as trustee for and in trust for the use of the Cherokee Nation various additional and other sums of money, stock, bonds, funds, lands, and property, the exact amount and kind of which plaintiff cannot now state, which belongs to said Cherokee Nation, and that under and by virtue of said treaty of July 19, 1866, the freedmen of the Cherokee Nation are entitled to participate in the same, and the profits and income thereof, as though native Cherokees, but that said Cherokee Nation and the national council thereof deny such right, and have refused and still do refuse to the said freedmen of the Cherokee Nation such right and all participation in said additional trust moneys, funds, stocks, bonds, lands, and property and the income and benefits thereof.

Plaintiff therefore prays for an accounting of the same, and for the decree and judgment of this court determining and establishing the right and interest of the freedmen of the Cherokee Nation in and to said last named trust fund, moneys, bonds, stocks, lands, and profits, when accounted and ascertained, and for the recovery and enforcement of said right and interest therein when established and determined.

16. Plaintiff further shows that out of the lands lying west of 96 degrees west longitude, and included in the tract above described as the Cherokee Outlet, and part of the lands owned by the said Cherokee Nation, the said Cherokee Nation sold to the United States of America the following valuations:

Lands for Poncas, 101,894.30 acres, at $1.25 an acre	$127,367.88
Lands for Pawnees, 230,014.04 acres	287,517.55
Lands for Nez Perces, 90,710.89 acres	113,388.61
Lands for Otoes and Missourias, 129,113.44 acres	161,391.80
Total	$689,655.55

That after deducting $48,389.45 paid by the United States to
19 the Cherokee Nation out of said fund, there remains in the hands of the United States the sum of $641,276.09; that the United States holds said last named sum, or a large portion thereof, in trust for the benefit of the Cherokee Nation; that under and by virtue of the said treaty of July 19, 1866, the freedmen of the Cherokee Nation are entitled to a pro rata share and interest of said last named trust fund and the benefits arising therefrom, but said Cherokee Nation and its national council have denied and still do deny any right on the part of the said freedmen of the Cherokee Nation to participate in said fund and the benefits thereof.

Plaintiff therefore prays the decree and judgment of this court determining and establishing the right and interest of the said freedmen of the Cherokee Nation in and to said last-named fund and the benefits thereof, and for the enforcement of said right and interest when so established.

17. Plaintiff further states that he believes the facts stated in the foregoing petition to be true, and that said Moses Whitmire, trustee, and the said freedmen of the Cherokee Nation whom he represents, has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the Government of the United States, and that no assignment or transfer of any of the rights or claims, or any part thereof, has been made except as stated in said petition; that the court may decree and adjudge the costs of this proceeding and the compensation of attorneys and counsel fees for the attorneys and counsel of plaintiff and order the same paid to the attorneys and counsel of the said freedmen of the Cherokee Nation, as provided in said act of Congress. And the plaintiff asks for the decree and judgment of this court upon the causes of action aforesaid, establishing and determining the rights, interests, and titles of the said freedmen of the Cherokee Nation as aforesaid, and for judgment against the Cherokee Nation in the aggregate for three millions of dollars, with full interest and costs of suit.

MOSES WHITMIRE,
Trustee for the freedmen of the Cherokee Nation.
By ROBERT H. KERN,
His Attorney.

20 UNITED STATES OF AMERICA, *ss:*

Moses Whitmire, trustee for the freedmen of the Cherokee Nation, being duly sworn, upon his oath states that the foregoing petition and the matters therein stated are true to the best knowledge, information, and belief of affiant.

MOSES (his x mark) WHITMIRE,
Trustee.

Signed in the presence of—

ROBINSON WHITE.
MILTON TURNER.

Subscribed and sworn to before me this 26th day of September, A. D. 1891.

[SEAL.]

ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

EXHIBIT A.

[Public—No. 335.]

AN ACT To refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That full jurisdiction is hereby conferred upon the Court of Claims, subject to an appeal to the Supreme Court of the United States as in other cases, to hear and determine what are the just rights in law or in equity of the Shawnee and Delaware Indians, who are settled and incorporated into the Cherokee Nation, Indian Territory, east of ninety-six degrees west longitude, under the provisions of article fifteen of the treaty of July nineteenth, eighteen hundred and sixty-six, made by and between the United States and the Cherokee Nation, and articles of agreement made by and between the Cherokee Nation and
21 the Shawnee Indians June seventh, eighteen hundred and sixty-nine, approved by the President June ninth, eighteen hundred and sixty-nine, and articles of agreement made with the Delaware Indians April eighth, eighteen hundred and sixty-seven; and also of the Cherokee freedmen, who are settled and located in the Cherokee Nation under the provisions and stipulations of article nine of the aforesaid treaty of eighteen hundred and sixty-six in respect to the subject matter herein provided for.

SEC. 2. That the said Shawnees, Delawares, and freedmen shall have a right, either separately or jointly, to begin and prosecute a suit or suits against the Cherokee Nation and the United States Government to recover from the Cherokee Nation all moneys due either in law or equity and unpaid to the said Shawnees, Delawares, or freedmen, which the Cherokee Nation have before paid out, or may here-

after pay, per capita, in the Cherokee Nation, and which was, or may be, refused to or neglected to be paid to the said Shawnees, Delawares, or freedmen by the Cherokee Nation, out of any money or funds which have, or may be paid into the treasury of, or in any way have come, or may come, into the possession of the Cherokee Nation, Indian Territory, derived from the sale, leasing, or rent for grazing purposes on Cherokee lands west of ninety-six degrees west longitude, and which have been, or may be, appropriated and directed to be paid out per capita by the acts passed by the Cherokee council, and for all moneys, lands, and rights which shall appear to be due to the said Shawnees, Delawares, or freedmen under the provisions of the aforesaid articles of the treaty and articles of agreement.

SEC. 3. That the said suit or suits may be brought in the name of the principal chief or chiefs of the said Shawnee and Delaware Indians, and for the freedmen and in their behalf, and for their use in the name of some person as their trustee, to be selected by them with the approval of the Secretary of the Interior. And the exercise of such jurisdiction shall not be barred by any lapse of time heretofore, nor shall the rights of such Indians be impaired by any acts passed and approved by the Cherokee national council. Suits may be
22 instituted within twelve months after the passage of this act, and the law and practice and rules of proceedure in such courts shall be the practice and law in these cases; and copies of petitions filed in the case at the commencement of the suit shall be served upon the Attorney General of the United States and on the principal chief in the Cherokee Nation by the marshal of the district court for the Indian Territory; and that the costs of the said suits shall be apportioned between the United States and the other parties to such suits as to said court law and equity shall require. The Attorney General shall designate and appoint from the Department of Justice a person who is competent to defend the said Cherokee Nation and the United States. And the said Shawnees, Delawares, and freedmen may be represented by attorneys and counsel. And the court is hereby authorized to decree the amount of compensation of such attorneys and counsel fees, not to exceed ten per centum of the amount recovered, and order the same to be paid to the attorneys and counsel of the said Shawnees, Delawares, and freedmen; and all judgments for any sum or sums of money which may be ordered or decreed by such court in favor of the Shawnees, Delawares, or freedmen, and against the Cherokee Nation, shall be enforced by the said court or courts against the said Cherokee Nation by execution mandamus, or in any other way which the said court may see fit.

SEC. 4. That the said Shawnee Indians are hereby authorized and empowered to bring and begin a suit in law or equity against the United States Government, in the Court of Claims, to recover and collect from the United States Government any amount of money that in law or equity is due from the United States to said tribes in reimbursement of their tribal fund for money wrongfully diverted

therefrom. The right of appeal, jurisdiction of the court, process, procedure, and proceedings in the suit here provided for shall be as provided for in sections one, two, and three of this act.

Approved, October 1, 1890.

23 *Amended petition. Filed May 3, 1893.*

United States of America. In the Court of Claims.

MOSES WHITMIRE, TRUSTEE FOR THE FREEDMEN OF the Cherokee Nation, plaintiff,
vs.
THE CHEROKEE NATION AND THE UNITED STATES of America, defendants.
No. 17209.

Amended petition.

The plaintiff, Moses Whitmire, as trustee for the freedmen of the Cherokee Nation, complains of the said Cherokee Nation and of the United States of America, and as cause of complaint, states:

1. That the persons herein described as the freedmen of the Cherokee Nation are the colored persons who prior to February , 1863, were held as slaves by members of the Cherokee Nation and who were liberated either by act of law or by the voluntary act of their former owners, and all free colored persons who were in the country of the Cherokee Nation in the Indian Territory at the commencement of the rebellion and were residents therein at the time of the taking effect of the treaty between the United States and the Cherokee Nation, concluded July 19, 1866, and proclaimed
24 August 11, 1866, or who might return thereto within six months, and also the descendants of all said freedmen and of all said colored persons.

2. That the said freedmen, acting under and by virtue of the act of Congress entitled "An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes," and approved October 1, 1890, and in accordance with the terms of said act and for the purposes therein mentioned, did on the day of , A. D. 1890, select the plaintiff, Moses Whitmire, as their trustee, which selection was, on the 7th day of January, A. D. 1891, duly approved by the Secretary of the Interior.

3. And the plaintiff, Moses Whitmire, as such trustee, has instituted this suit for the purposes in said act of Congress set forth, and in furtherance thereof files this his amended petition against the Cherokee Nation and the United States of America.

4. That is was provided by the treaty hereinbefore referred to, among other things, as follows, viz.:

"ARTICLE IV. All the Cherokees and freed persons who were formerly slaves to any Cherokee and all free negroes not having been such slaves who resided in the Cherokee Nation prior to June first,

eighteen hundred and sixty-one, who may within two years elect not to reside northeast of the Arkansas River and southeast of Grand River shall have the right to settle in and occupy the Canadian district southwest of the Arkansas River, and also all that tract of country lying northwest of Grand River and bounded on the southeast by Grand River and west by the Creek Reservation to the northeast corner thereof; from thence west on the north line of the Creek Reservation to the ninety-sixth degree of west longitude; and thence north on said line of longitude so far that a line due east to Grand River will include a quantity of land equal to one hundred and sixty acres for each person who may so elect to reside in the territory above described in this article: Provided, That that part of said district north of the Arkansas River shall not be set apart until it shall be found that the Canadian district is not sufficiently large to allow one hundred and sixty acres to each person desiring to obtain settlement under the provisions of this article.

"ARTICLE V. The inhabitants electing to reside in the district described in the preceding article shall have the right to elect all their local officers and judges, and the number of delegates to which by their numbers they may be entitled in any general council to be established in the Indian Territory under the provisions of this treaty, as stated in Article XII; and to control all their local affairs, and to establish all necessary police regulations and rules for the administration of justice in said district, not inconsistent with the constitution of the Cherokee Nation, or the laws of the United States: Provided, The Cherokees residing in said district shall enjoy all the rights and privileges of other Cherokees who may elect to settle in said district as hereinbefore provided, and shall hold the same rights and privileges and be subject to the same liabilities as those who elect to settle in said district under the provisions of this treaty: Provided, also, That if any such police regulations or rules be adopted which, in the opinion of the President, bear oppressively on any citizen of the nation, he may suspend the same. And all rules or regulations in said district, or in any other district of the nation, discriminating against the citizens of other districts, are prohibited and shall be void.

"ARTICLE VI. The inhabitants of the said district hereinbefore described shall be entitled to representation according to numbers in the national council, and all laws of the Cherokee Nation shall be uniform throughout said nation. And should any such law, either in its provisions or in the manner of its enforcement, in the opinion of the President of the United States, operate unjustly or injuriously in said district, he is hereby authorized and empowered to correct such evil, and to adopt the means necessary to secure the impartial administration of justice, as well as a fair and equitable application and expenditure of the national funds, as between the people of this and of every other district in said nation.

* * * * * * *

"ARTICLE IX. The Cherokee Nation having, voluntarily, in February, eighteen hundred and sixty-three, by an act of their national council, forever abolished slavery, hereby covenant and agree that never hereafter shall either slavery or involuntary servitude exist in their nation otherwise than in the punishment of crime, whereof the party shall have been duly convicted, in accordance with laws applicable to all the members of said tribe alike. They further agree that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who are in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees: Provided, That owners of slaves so emancipated in the Cherokee Nation shall never receive any compensation or pay for the slaves so emancipated."

And by virtue of the said treaty the said freedmen and the said free colored persons, and their descendants, were made and became members of the said Cherokee Nation, and were endowed with all the rights of native Cherokees.

5. At and prior to the time of the said treaty the Cherokee Nation were the owners of the country in the Indian Territory and the State of Kansas, inhabited, occupied, or used by them, having acquired the same by grant from the United States of America, and consisting of tracts of land described as follows, to wit:

"Beginning at a point on the old western territorial line of Arkansas Territory, being twenty-five miles north from the point where the territorial line crosses Arkansas River, thence running from said north point south on the said territorial line to the place where said territorial line crosses the Verdigris River; thence down said Verdigris River to the Arkansas River; thence
27 down said Arkansas to a point where a stone is placed opposite to the east or lower bank of Grand River at its junction with the Arkansas; thence running south, forty-four degrees west, one mile; thence in a straight line to a point four miles northerly from the mouth of the North Fork of the Canadian; thence along the said four miles' line to the Canadian; thence down the Canadian to the Arkansas; thence down the Arkansas to that point on the Arkansas where the eastern Choctaw boundary strikes said river, and running thence with the western line of Arkansas Territory, as now defined, to the southwest corner of Missouri; thence along the western Missouri line to the land assigned the Senecas; thence on the south line of the Senecas to Grand River; thence up said Grand River as far as the south line of the Osage Reservation, extended, is necessary; thence up and between said south Osage line, extended west, if necessary, and a line drawn due west from the point of beginning to a certain distance west, at which a line running north and south from said Osage line to said due west line will make seven millions of acres within the whole described boundaries."

Also, a perpetual outlet west and the free and unmolested use of all the country lying west of the western boundary of the tract

hereinbefore described as far west as the sovereignty of the United States and their right of soil extended at the time of the grant; provided, however, that if the saline or salt plain on the great western prairies should fall within said limits prescribed for said outlet, the right was reserved to the United States to permit other tribes of red men to get salt on said plain in common with the Cherokees.

Also a tract of land, situated "between the west line of the State of Missouri at the southwest corner of the same, and running north along the east line of the Osage lands, fifty miles to the northeast corner thereof, and thence east to the west line of the State of Missouri; thence with said line south fifty miles; thence west to the place of beginning; and estimated to contain eight hundred
28 thousand acres of land; excepting any land assigned to the Quapaws falling within said bounds."

That said lands had not any of them been conveyed to or acquired by, nor were they owned or held in severalty or in individual right by the persons comprising the Cherokee Nation, but had been granted to and acquired by the Cherokee Nation as such for the common use of the said nation, and were common property and were so held at the time of the said treaty.

6. That since the date of the treaty hereinbefore referred to, the said Cherokee Nation, being duly authorized thereunto, have sold large parcels of the said land, as follows, viz:

Under the provisions of article 17 of the said treaty the lands described in the said article and known, a portion of them, as "neutral lands," and another portion as the "strip," the neutral lands consisting of 799,614.72 acres and the strip of 434,679.36 acres.

Under the provisions of the 16th article of said treaty lands have been sold to friendly Indians, as follows, viz:

To the Delawares, 157,600 acres.

To the Osage and Kansas Indians, 1,570,196.30 acres.

To the Pawnees, 230,014 acres.

To the Poncas, 101,894.31 acres.

To the Nez Perces, 90,710.89 acres.

To the Otoes and Missouris, 129,113.20 acres.

Under the provisions of an act of Congress entitled "An act to ratify and confirm an agreement with the Cherokee Nation of Indians of the Indian Territory, to make appropriation for carrying out the same, and for other purposes," and approved March 4, 1893, the said Cherokee Nation sold to the United States of the lands remaining to them 8,144,682.91 acres, more or less.

That there remain to the said Cherokee Nation lands in the
29 Indian Territory, the precise number of acres of which the plaintiff is unable to state, but which amount as he believes approximately to be three and a half million acres.

7. That at the time of the treaty hereinbefore referred to the United States held in trust for the said Cherokee Nation the sum of $703,158.72. That since said time said trust fund has been increased by adding thereto portions of the proceeds of the sales of lands made

as hereinbefore set forth, and by contributions made from other resources of the said nation, until now the said trust fund amounts to $2,636,634.73; and the said Cherokee Nation are the owners of the said fund so held in trust for them by the United States.

That in addition to the funds so as aforesaid held in trust for the Cherokee Nation by the United States, there is due to the said nation from the United States the sum of $8,595,736.12 under and in accordance with the terms of the act of Congress entitled "An act to ratify and confirm an agreement with the Cherokee Nation of Indians of the Indian Territory, to make appropriations for carrying out the same, and for other purposes," approved March 4, 1893.

In addition to the trust fund so as aforesaid held by the United States, and the sum of money due from the United States under the act of Congress approved March 4, 1893, the said Cherokee Nation have from time to time received large sums of money, being proceeds of the sales of lands belonging to them, and other large sums of money, being money paid to the said nation under leases or permits to use lands belonging to them granted by the said nation to various persons, partnerships, and companies, a large amount of which moneys so received by the said nation is still held by them, and other large amounts have been paid out and distributed as hereinafter set forth. The exact amount of the moneys so received by the said nation and the amounts still held by them, as well as the amounts so paid out and distributed as hereinafter set forth, the plaintiff is unable to state, but he is informed and believes that more than three million of dollars have been so received by the said nation.

8. That the total number of the members of the said Cherokee Nation is eighteen thousand, and of these five thousand are the freedmen who are the beneficiaries of this suit.

9. That the said freedmen by virtue of the said treaty became and were incorporated into the said Cherokee Nation as a part thereof, in like manner as if they were native Cherokees, and the said freedmen became and are entitled to share in like manner and in equal measure with the native Cherokees in all the lands, moneys, funds, stocks, and bonds, and other property of the Cherokee Nation.

10. That the members of the said nation who are native Cherokees constitute a majority of the said nation and manage its business and control and direct all its affairs, and the said native Cherokees, in denial of the manifest rights of the freedmen in that behalf, have appropriated to themselves all the property of the said nation of every nature, and have excluded the said freedmen from any use of or share in the same, or in any part thereof; and the said native Cherokees, to give the form and sanction of law to the appropriation exclusively by and to themselves of all the property of the said nation, did cause and procure the general council of the Cherokee Nation, by an act of the said council, approved April 27, 1886, entitled "An act of construction of the rights of Cherokee citizenship as designed to be

conferred upon the freedmen and friendly Indians by the ninth
31 and fifteenth articles of the treaty of 1886," to declare and enact:

"That the phrase 'all the rights of native Cherokees,' as used in the 9th and 15th articles of the treaty of July 19th, 1866, between the United States and this nation, is hereby construed to mean the individual rights, privileges, and benefits enjoyed by white adopted citizens of this nation before and at the making of said treaty, and who had been by law admitted to 'all the rights of a native Cherokee, civil, political, and personal,' as subjects of the Cherokee Nation of Indians, without acquiring any right or title to the Cherokee domain, or to the proceeds thereof, when made subject to a division among those to whom such domain had been conveyed, all the rights of the lands held and owned by this nation and to the principal of the proceeds thereof when realized, being reserved by and to the original Cherokee owners, as in the case of white adopted citizens aforesaid, subject to be conveyed or granted only at the option of said owners, or for value received, according to agreements provided to be made with friendly Indians in conformity with the 15th article of said treaty."

And the said general council of the Cherokee Nation, and the members of the said nation who are native Cherokees, have by the said enactment of the said general council and by their discriminating administration of the property and affairs of the said nation, appropriated the national funds and the national lands and all interests, incomes, rents, and profits thereof to the exclusive use, benefit, and ownership of the said native Cherokees.

11. That at divers times since the year 1866 moneys derived from the sale of lands belonging to the Cherokee Nation and moneys derived from granting the use of their lands to persons, partnerships, and corporations, have been by the said Cherokee Nation distributed per capita among the members of the said nation who are
32 native Cherokees, but in all such per capita distribution of moneys so derived by the said nation from the sale and letting to others to use their common lands, the said freedmen have been excluded and they have not been permitted to participate therein in any measure or manner whatsoever. The precise amount of the moneys so distributed, plaintiff is unable to state, but he is informed and believes that it exceeds two million of dollars.

12. That the said native Cherokees still persist in their claim, assertion, and exercise of exclusive ownership of all the property of every name and nature belonging to the said Cherokee Nation, and in their denial of the rights of the freedmen therein and thereto; and the said native Cherokees have declared their intention and are contriving to distribute the money to be received by virtue of the act of Congress of March 4, 1893, hereinbefore referred to, per capita among themselves, and to exclude the said freedmen from any and all share or participation therein; and the said Cherokee Nation and

the said native Cherokees will, if permitted to do so, forever deny to the said freedmen any right in or to any property of the said nation, and will forever exclude them from any share or interest therein.

13. That all the acts and doings of the native Cherokees and the acts and doings of the said Cherokee Nation, in appropriating to the exclusive use and ownership of the said native Cherokees the property of the said nation, and in excluding the freedmen from any part therein, are unjust and illegal and in plain contravention and denial of the rights of the said freedmen.

14. That the said freedmen are without means of remedy except as may be granted by this honorable court in this proceeding.

33 15. To the end, therefore, that there may be a full and final determination of the rights of the said freedmen, and that there may be complete and adequate redress of the wrongs now and heretofore suffered by them, the plaintiff prays:

1st. That the said Cherokee Nation and the United States may full answer make to this petition and disclose—

(a) The amount of the national funds held in trust by the United States for the said Cherokee Nation at the time of the treaty hereinbefore referred to, the accessions to said fund since that time, together with the sources from which said accessions were derived and the uses which have been made of the interest and income of said funds.

(b) The amount of land owned by the said nation at the time of said treaty, the disposition made of the same since that time, the amount of such land remaining to the said nation, the amount of moneys received from the sale or cession of lands, and the use or disposition made of such moneys, with details as to dates and amounts.

(c) The amount of money received from time to time since 1866 from persons, partnerships, and corporations for the use by them of any of the lands of the Cherokee Nation, together with the names of the persons, partnerships, and corporations for the use by them of any of the lands of the Cherokee Nation, together with the names of the persons, partnerships, and corporations from whom such moneys were received, and the details of date and amounts, and the use or disposition made of such moneys and the dates when they were so used and disposed of.

(d) The amount of money, other than that held in trust by or due from the United States, owned by the said nation, and the kind and value of all other property owned by the said nation.

34 2d. And plaintiff prays the court to make proper orders for the due ascertainment and determination of the whole number of the members of said Cherokee Nation and the number of the said freedmen.

3d. And plaintiff prays that there may be an accounting of all moneys, funds, and property of every kind of the said Cherokee Nation which has been since the year 1866 paid out to, distributed among, or exclusively appropriated by the native Cherokees, or which may be so paid out, distributed or appropriated, and that the

proportion of the same rightfully due to the said freedmen and free colored persons be ascertained and determined, and that the plaintiff have and recover judgment for the amount of the same against the said Cherokee Nation, and that the said judgment be enforced by execution or mandamus, or in such other way as to the court may seem fit and proper.

4th. And plaintiff prays for a decree of this honorable court, holding as null and void all acts and doings of the said Cherokee Nation and of the general council and other authorities, excluding the said freedmen from any part, interest, or right in and to the property of the said nation, and forever prohibiting any discrimination against them in the use, enjoyment, disposition, or distribution of the said property or its proceeds, and quieting, confirming, and establishing the rights and interests of the said freedmen as members of the Cherokee Nation in like manner and in equal measure with native Cherokees in and to all and singular the moneys, lands, and other property of the said Cherokee Nation.

5th. And plaintiff prays that the court may decree the compensation of the attorneys and counsel of the plaintiff and order and direct the payment of the same.

35 6th. And plaintiff prays that he have and recover of the defendant, the Cherokee Nation, the costs of this suit, and that he have such other and further relief as he may show himself entitled to, and as to the court may seem meet and proper.

Plaintiff states that he believes the facts stated in this petition to be true, and that he has not, and the said freedmen of the Cherokee Nation whom he represents have not, in any way voluntarily aided, abetted, or given encouragement to rebellion against the Government of the United States, and that no assignment or transfer of any of the rights or claims or any part thereof has been made, except as stated in the petition.

MOSES WHITMIRE,
Trustee for Freedmen of the Cherokee Nation.
Per ROBERT H. KERN,
His Attorney.

UNITED STATES OF AMERICA, *ss:*

Robert H. Kern, attorney for Moses Whitmire, trustee for the freedmen of the Cherokee Nation, being duly sworn, upon his oath states that the foregoing petition and the matters therein stated are true to his best knowledge, information, and belief.

ROBERT H. KERN.

Signed in the presence of Thos. B. Huyck.

Subscribed and sworn to before me this 3d day of May, A. D. 1893.

THOS. B. HUYCK,
[SEAL.] *Notary Public.*

36 *Separate answer of the Cherokee Nation. Filed by leave of court February 14, 1895, nunc pro tunc, as of December 19, 1894.*

MOSES WHITMIRE, TRUSTEE, &C.,
vs.
THE CHEROKEE NATION AND THE UNITED STATES. } No. 17209.

Separate answer of the defendant, The Cherokee Nation.

The defendant, the Cherokeen Nation, for answer to the petition of the complainant, herein filed, says:

1st. It admits the allegation in the first paragraph of said amended petition filed herein.

2nd. It admits the allegations in the third paragraph of the said amended petition.

4th. It admits the allegations in the 4th paragraph of the said amended petition, with the modifications as to the rights acquired by the freedmen of the Cherokee Nation as hereinafter more particularly set forth.

5th. It admits the allegations of the fifth paragraph of the said amended petition.

6th. It admits the allegations in the sixth paragraph of said amended petition.

7th. It admits the allegations of the seventh paragraph of said amended petition, except that the amount of the Cherokee national fund held in trust by the U. S. at the date of the treaty therein referred to was $678,000 instead of $703,158.72, as stated by the complainant, and except that the amounts received by said nation from leases and privileges was about $1,000,000 instead of $3,000,000.00, as in said paragraph alleged.

8th. In answer to the eighth paragraph of the said amended petition, the defendant says that the citizenship of the Cherokee Nation is as follows, to wit:

37

Cherokees by blood	21,232
Adopted whites	2,011
Delawares	759
Shawnees	624
Creeks	82
Choctaws	11
Negroes	2,052
Total	26,771

As found by this court in the case of Johnson Blackfeather, etc., vs. The United States and the Cherokee Nation, which figures are relatively about correct, but may be subject to some modification.

9th. In answer to the ninth paragraph of said amended petition the defendant says: That it is true that by virtue of the treaty mentioned the freedmen of the Cherokee Nation were admitted to membership

therein and incorporated into said nation, with all the civil, political, and personal rights of native Cherokees, and entitled to participate in all benefits of the government and institutions of said nation.

But defendant denies that by virtue of said treaty or in any other manner said freedmen became entitled to share in the land or wealth of the Cherokee Nation or the proceeds thereof or the income therefrom.

10th. The defendant admits that the national council of the Cherokee Nation did pass an "act of construction of the rights of Cherokee citizenship," etc., as set out in said tenth paragraph of said amended petition. But defendant denies that the native Cherokees have assumed any unlawful control of the legislative or political branch of the Cherokee government or have improperly or unlawfully usurped any powers in derogation of the rights of the freedmen of said nation, as herein admitted to exist. But on the other hand defendant alleges the fact to be that said freedmen have at all times since the ratification of said treaty, had and exercised all the rights of native Cherokees, without discrimination or interference.

11th. In answer to the eleventh paragraph of said amended petition, the defendant says that it denies that any moneys derived from the sale of lands or leases thereof have been distributed to Cherokees by blood only, except $300,000 appropriated by act of Congress of June 30th, 1884 (22 Stat., 624), and paid to the Cherokee Na-
38 tion on account of lands west of the Arkansas River, and by said nation paid out to Cherokees "by blood" under authority of the act of the Cherokee council above referred to, and certain moneys received as rental for the lands known as the "Cherokee Outlet," as hereinafter more fully set forth.

12th. The defendant admits the allegations contained in the twelfth paragraph of said amended petition.

13th. The said defendant in answer to the thirteenth paragraph of said amended petition denies that in appropriating the proceeds of lands west of the 96° to the exclusive use of native Cherokees it has unlawfully or improperly discriminated against the freedmen of said nation represented by the plaintiff.

14th. The said defendant, further answering, says: That the $300,000.00 appropriated by the act of Congress of June 30th, 1884 (22 Stat., 624), and paid to the Cherokee Nation on account of lands west of the Arkansas River, and by said nation paid out to Cherokees "by blood," under authority of an act of the Cherokee council, approved May 19th, 1883, was properly and lawfully paid to those who were entitled thereto; that said act of Congress authorized the disbursement of said sum "as the act of the Cherokee legislature direct," and was passed with the full knowledge of the existing act of the Cherokee council and in ratification thereof. And the defendant further says that by the appropriation and payment to the Cherokee freedmen of their proportionate share of $75,000.00, which said sum was charged to the Cherokee Nation for the alleged purpose of

equalizing to the Delawares, Shawnees, and freedmen the $300,000.00 paid to the Cherokees by blood, as aforesaid, said Cherokee freedmen illegally and improperly obtained possession of their proportion of said sum, to wit, $18,000.00, under a mistake of fact, which said amount, with interest from the day of , 1883, the defendant, the Cherokee Nation, asks judgment against the plaintiff.

15th. Said defendant further answering says: That the freedmen of the Cherokee Nation were admitted to citizenship therein, by virtue of the ninth article of the treaty between the United
39 States and the Cherokee Nation of July 19th, 1866, with "all the rights of native Cherokees;" that by said expression it was the purpose and intention to confer upon said freedmen the same civil, political, and personal rights as were enjoyed by native Cherokees, but that it was not the intention or purpose of said treaty to confer upon said freedmen any interest whatever in the lands, domain, public property or wealth of the Cherokee Nation, and that said freedmen, by virtue of said treaty, acquired no interests whatsoever in any of said property, lands, or domain, or any rentals or proceeds arising therefrom.

16th. Defendant admits that it received as rental for its land, known and designated as "the Cherokee Outlet," during the period from 1883 to 1888 inclusive, a large amount of money, a portion of which was used for certain governmental purposes for the equal benefit of the native Cherokees and the various peoples and persons affiliated with them, and that about $595,000 thereof was distributed per capita to Cherokees by blood only, under an act of the Cherokee council of April 28th, 1886, as in plaintiff's petition alleged; but the defendant says that the lands out of the leases of which said funds were realized were the separate, sole, and exclusive property of the Cherokees by blood, in which or to which the freedmen of said nation had no interests of any description or kind whatsoever; that said freedmen had no right, claim, or interest to the funds so arising from said lands, although they were permitted, by the sufference of the Cherokee Nation, to enjoy certain public benefits to which a portion of said proceeds was devoted by act of the Cherokee council.

17th. In answer to the special interrogatories of said amended petition marked, respectively, (a), (b), (c), & (d), defendant hereto attaches a statement marked "Exhibit A," "B," & "C," respectively, giving in detail the facts and figures therein requested.

Wherefore this defendant, having fully answered every ma-
40 terial allegation in the petition contained which it is advised it is material for it to make answer unto, prays to be hence dismissed with its costs in this behalf most wrongfully sustained.

C. A. Maxwell,
Geo. S. Chase,
Attorneys for Defendant, the Cherokee Nation.

41 *Replication. Filed February 14, 1895, nunc pro tunc, as of December 19, 1894.*

Now comes plaintiff, and for replication to defendants' answer denies each and every allegation therein made and contained.

R. H. KERN,
Plaintiff's Attorney.

42 *Argument and submission of case.*

On the 19th day of December, 1894, this case was argued by Mr. Frederick W. Lehman for the freedmen, Mr. George S. Chase for the Cherokee Nation, and Mr. Charles C. Binney for the United States and submitted.

43 On March 4, 1895, the court filed the following opinion:

NOTT, J., delivered the opinion of the court:

In the case of the Delaware Indians v. The Cherokee Nation (28 C. Cls., 281; U. S. R.,) three things were determined. The first was that the lands of the nation are public property in the same sense that the lands of the United States are public property and not communal property of native Cherokees. The second was that the Delawares were entitled, as citizens by adoption, to participate in the distribution of the proceeds of the public domain equally with native Cherokees. The third was that statutes enacted by the national council which discriminate against Delawares by distributing the proceeds of the public domain exclusively among "Cherokees by blood" are to that extent and as against the Delawares unconstitutional and void.

The present suit represents another class of adopted Cherokee citizens, the freedmen of the nation. Their case varies somewhat from that of the Delawares, but rests on the same constitutional provisions, those adopted in 1866, which are in these words:

"SEC. 2. The lands of the Cherokee Nation shall remain common property until the national council shall request the survey and allotment of the same, in accordance with the provisions of article 20th of the treaty of 19th of July, 1866, between the United States and the Cherokee Nation.

"SEC. 5. No person shall be eligible to a seat in the national council but a male citizen of the Cherokee Nation who shall have attained to the age of twenty-five years and who shall have been a bona fide resident of the district in which he may be elected at least six months immediately preceding such election. All native-born Cherokees, all Indians, and whites legally members of the nation by adoption, and all freedmen who have been liberated by voluntary act of their former owners or by law, as well as free colored persons who were in the country at the commencement of the rebellion and are now residents therein, or who may return within six months from the 19th day of July, 1866, and their descendants who reside within the limits of the Cherokee Nation, shall be taken and deemed to be citizens of the Cherokee Nation."

But there were two elements in the case of the Delawares which were considered in connection with the above provisions and may have affected the interpretation given to the constitution. The first was the treaty 19th July, 1866 (14 Stat. L., p. 799), between the United States and the Cherokee Nation, which preceded and induced the constitutional amendments above set forth; the second, the treaty or agreement, 8th April, 1867, between the Cherokee Nation and the Delawares, by virtue of which the latter entered into and became a part of the nation.

At the close of the Civil War the Cherokee country was virtually conquered territory and the Cherokee Nation at the mercy of the United States. As a condition to peace and the continued existence of
44 the nation as a government, the United States insisted, among other things, that certain Indian tribes might be incorporated into and form a part of the body politic, or at least be removed into the Cherokee country. This condition was agreed to and embodied in the treaty. But at the same time there were limitations set upon the obligation. The "civilized Indians friendly with the Cherokees" who were so to be brought in were to pay "into the Cherokee national fund a sum of money which shall sustain the same proportion" to the then existing national fund "that the number of Indians sustained to the whole number of Cherokees" then residing in the Cherokee country; and their settlement in the Cherokee country was not to be altogether a matter of right, but "on such terms as may be agreed upon by any such tribe and the Cherokee, subject to the approval of the President of the United States" and consistent with the terms of the treaty.

Pursuant to the intent of the treaty, the Cherokees and the Delawares did enter into such an agreement 8th April, 1867. The Cherokees agreed "to sell to the Delawares for their occupancy a quantity of land east of the line of the 96° west longitude, in the aggregate equal to 160 acres for each individual of the Delaware tribe who has been enrolled upon a certain register made February 18, 1867." And they further agreed that "the selections of the lands to be purchased by the Delawares may be made by said Delawares in any part of the Cherokee Reservation east of said line of 96° not already selected and in possession of other parties." The Delawares, on their part, agreed to pay for these lands "a sum of money equal to $1 per acre for the whole amount of 160 acres of land for every individual Delaware." They also agreed "that there shall be paid from their funds now or hereafter to come into possession of the United States a sum of money which shall sustain the same proportion to the existing Cherokee national fund that the number of Delawares, registered as above mentioned and removing to the Indian country, sustains to the whole number of Cherokees residing in the Cherokee Nation."

The treaty also provided that the "friendly Indians" who might abandon their tribal organization and remove into the Cherokee country "shall be incorporated into and ever after remain a part of the Cherokee Nation on equal terms in every respect with native citizens."

And the agreement with the Delawares went still further and provided:

"On the fulfillment by the Delawares of the foregoing stipulations all the members of the tribe registered as above provided shall become members of the Cherokee Nation, with the same rights and immunities and the same participation (and no other) in the national funds as native Cherokees, save as hereinbefore provided.

"And the children hereafter born of such Delawares so incorporated into the Cherokee Nation shall in all respects be regarded as native Cherokees."

The freedmen did none of these things. In 1866 they were, or had been, inhabitants of the Cherokee country. The treaty created for them new rights, "the right to settle in and occupy," with others, a designated district; the right with the other inhabitants of the district "to elect all their local officers and judges" and "to control all their local affairs" not inconsistent with the constitution of the nation; and to representation in the national council. The treaty also secured for them the guaranty that "all laws of the Cherokee Nation shall be uniform throughout said nation" and that the freedmen "and their descendants shall have all the rights of native
45 Cherokees." The freedmen entered into no agreement; they were not parties to the treaty; they paid nothing for the homes they acquired; and they contributed nothing to the national fund in the custody of the United States. Neither did the Cherokees enter into an express agreement with them, as with the Delawares, that they should become members of the Cherokee Nation "with the same rights and immunities" and "the same participation in the national funds as native Cherokees," and that their children thereafter born "should in all respects be regarded as native Cherokees."

The freedmen now seek a decree awarding to them their proportionate share in the avails of the "public domain" as if they were native Cherokees, and "in and to all and singular the moneys, lands, and other property of the Cherokee Nation." The counsel for the defendants contend that a distinction can be drawn between this case and that of the Delawares; that the rights of the freedmen in the Cherokee Nation are political and not communal; that they acquired no right of property under the treaty except that of possessing 160 acres each.

Here it should be noted that when the treaty was made there had long been a peculiar class of citizens in the Cherokee country—white men who became citizens by intermarriage. Concerning them Cherokee law had declared that if one be left a widower he should continue to enjoy the rights of citizenship unless he should marry a person "having no rights of Cherokee citizenship by blood." Also, that if one should abandon his wife he should "thereby forfeit every right and privilege of citizenship and be removed from the nation." There was also a significant provision attached to the law allowing citizenship by intermarriage, which was in these words:

"Provided, also, that the rights and privileges herein conferred shall not extend to right of soil or interest in the vested funds of this nation, unless such adopted citizen shall pay into the general fund of the national treasury a sum of money, to be ascertained and fixed by the national council, equal to the 'pro rata' share of each native Cherokee in the lands and vested wealth of the nation, estimated at five hundred dollars (Code, p. 224)."

The idea therefore, existed, both in the mind and in the laws of the Cherokee people, that citizenship did not necessarily extend to or invest in the citizen a personal or individual interest in what the constitution termed the "common property," "the lands of the Cherokee Nation." In accordance with this idea the national council, by an act approved April 27, 1886, entitled "An act of construction of the rights of Cherokee citizenship as designed to be conferred upon the freedmen and friendly Indians by the ninth and fifteenth articles of the treaty of 1866," enacted and declared as follows:

"That the phrase 'all the rights of native Cherokee,' as used in the 9th and 15th articles of the treaty of July 19th, 1866, between the United States and this nation, is hereby construed to mean the individual rights, privileges, and benefits enjoyed by white adopted citizens of this nation before and at the making of said treaty, and who had been by law admitted to 'all the rights of a native Cherokee, civil, political, and personal,' as subjects of the Cherokee Nation of Indians, without acquiring any right or title to the Cherokee domain, or to the proceeds thereof, when made subject to a division among those to whom such domain had been conveyed, all the rights of the lands held and owned by this nation, and to the principal of the proceeds thereof when realized, being reserved by and to the original Cherokee owners, as in the case of white adopted citizens aforesaid, subject to be conveyed or granted only at the option of said owners, or for value received, according to agreements provided to be made with friendly Indians in conformity with the 15th article of said treaty."

46 The fact is that from the constitution of 1837 to this statute of 1886 there were two inconsistent principles operating in the affairs of the Cherokee people. The common mind clung to the hereditary idea that the lands of the Cherokees are communal, and, like all communal lands, heritable, descending with the blood of the owners. And the constitution left the communal character of the lands, so far as individual ownership was involved, unchanged. No titles in fee simple existed or could exist; the citizen had but the right of occupation; the right of occupation was heritable, but inalienable; when occupancy ceased, the right of occupation expired. So far as appearances went, the lands continued to be the common property of the Cherokee people—of the people who had inherited them from their Cherokee fathers—of the people who were "Cherokees by blood." That alien tribes admitted within the bounds of Cherokee territory would thereby become joint owners in their own common property in their lands, occupied or unoccupied, was unantici-

pated by the mass of the people. Still less was it anticipated in 1866 that their former servants and bondmen, then admitted to free homes within the Territory, would one day claim that by virtue of that admission they had become coequal owners with the Cherokees who were Cherokees by blood in the vast domain of their unoccupied lands. It was no more thought that these strangers would be admitted to share in the unoccupied lands of the Cherokees than in their cultivated fields. To allow them to dwell within their Territory and vote and be called Cherokee citizens and enjoy political rights was one thing; to give them an equal share with themselves in their own exclusive, though undivided, property was another. The communal idea, too, had been kept alive until 1866 by the national fund in the Treasury of the United States. Had not Cherokees by blood, and by blood only, received annuities? Was not that fund derived from the sale of their lands? If they had sold all of their unoccupied lands before the intrusion of the Delawares and freedmen, would not the national fund have been immensely larger and would not their annuities have been proportionately greater? Moreover, had there not been strangers in the Cherokee country ever since the time when the nation was forcibly brought from its territory in Georgia—white men who were allowed to live and occupy and intermarry—but had it ever been asserted by these intruders, or by the United States on their behalf, that they could share in the annuities or lay claim to the proceeds of the lands?

Nevertheless, a conflicting principle had been embodied in the supreme and statute law of the Cherokees. By the adoption of the constitution in 1837 the title of the common property passed from the communal owners and became vested in the newly-founded government of the nation. The character of the communal owners also changed. They became, and thenceforth were to be, simply "citizens;" citizens whose rights were defined and limited by their constitution and their laws. The constitution does indeed declare that "the lands of the Cherokee Nation shall remain common property," but other provisions show that this one meant that the soil, whether occupied or unoccupied, was never to become individual property, and that the estate of the citizen in the realty which he possessed was always to be limited to a right of occupancy. Communal property and communal owners gave place to "the public domain" and to "citizens of the Cherokee Nation."

47 The counsel for the defendants have pressed upon the court with great force and earnestness the argument that the idea of communal property is and always has been inborn with the Indian, and that the Cherokees never could have intended to admit the freedmen to other than political rights. It is said:

"There is and can be no analogy between the Cherokee Nation and the United States or a State in respect to the public national possessions. We cannot imagine such a thing as a sale of our public domain for the purpose of distributing the proceeds pro rata among the 'citizens.' No such transaction was ever dreamed of. But it always

has been, and is to-day, the central idea of the Indian, whether wild, half civilized, or civilized. There has not been a session of Congress in a century that legislation has not been enacted looking to the purchase of Indian lands or extinguishment of Indian titles and payment, in some form, to the individual members of the tribe or tribes making the cessions. Some payment per capita is the almost invariable accompaniment of the transaction, down to the present movement, and so tenacious are they of this idea that without it the effort to negotiate treaties would be a futile undertaking.

"Holding these ideas of their common lands and property, following the traditions of centuries, as well as being prompted by self-interest, it is incredible that the Cherokees intended to give away interests equal with their own, in all their lands and wealth, the inheritance of their fathers, and this not only to the former slaves of some of their citizens, but to all colored persons who happened to be in their country at the close of the war."

But the court carefully considered this question of communal property in the previous case of the Delawares, and that decision has been affirmed by the Supreme Court. It was there held that while all Indian lands were originally communal, the fee being vested in the community as such, with a mere right of occupancy in members of the community regulated and restricted by custom, in the Cherokee country, the control has passed from the communal owners and become lodged in the State, and the unoccupied lands or "public domain," analogous to the public lands of the United States, is held absolutely by the Government as a trust for governmental purposes and the general welfare. The facts that the freedmen did not pay for the homes which they acquired; that they did not contribute to the national fund; that they did not come into the nation by virtue of an express agreement; that their foothold was acquired exclusively through the interposition of the United States, and exclusively by virtue of the treaty of 1866, are facts which operate against the equity of their case, but do not take their legal rights out of the safeguard of the constitution, or the obligations of the treaty. When the Cherokee people wrote into their constitution in 1866 "all native-born Cherokees, all Indians and whites legally members of the nation by adoption, and all freedmen" "shall be taken and be deemed to be citizens of the Cherokee Nation," they fixed the status of the freedman and raised him to the same rank of citizenship which they themselves enjoyed. Thenceforth he was to be equal with themselves under the constitution, governed by the same laws, enjoying the same rights, possessed of the same immunities, and entitled to the same protection. If the common property was to be retained for the general welfare, he was to share equally in its benefits; if it was to be sold and its proceeds divided, the constitution made it as much his as theirs.

The court appreciates the earnest argument of the counsel for the defendants that this result could not have been anticipated by the Cherokees when they ratified the treaty of 1866, and the court has

heretofore anticipated the counsel in an expression of the same
48 opinion (28 C. Cls., 317). The result indeed was not anticipated. If the Cherokee Nation had grown and the national territory had been filled according to the ordinary law of empires, by natural increase and immigration, this vexed question would never have been heard of; or if a portion of the public domain had been sold and the proceeds had been applied to governmental purposes, the freedmen sharing with the Cherokees equally in the benefits accruing therefrom, no one would have quarreled with the result. The trouble has come from the fact that, to quote the language of the previous opinion, "the Cherokees are selling the heritage of their fathers and the patrimony of their children, and dividing the money among the present generations; that is, among themselves, instead of funding it as a part of their national resources for the welfare of those who are to come after them." The Cherokees did not foresee that this radical change of conditions would take place; neither did the Delawares and the freedmen. If it had been foreseen the one party might have stipulated that the proceeds of the property should go exclusively to themselves who were Cherokees by blood. But the other party might also have stipulated that the public domain of the nation, of which they were about to become citizens, should not be squandered in this way and should remain what it then was, the common property of all.

It is also urged by the counsel for the defendants and with great force that the sovereignty of the Cherokee Nation has always been and is now recognized by the United States; and that as a sovereign power it has the inherent right to administer its internal affairs in its own way and to regulate the rights of its citizens by its own laws. It is said:

"That the Cherokees possess the sole and exclusive right to manage their own internal affairs and of control of the persons and property of their citizens, there has been no question for more than half a century, and this right has been recognized by the Government of the United States by an unbroken current of precedents through all this time.

"So, if we admit, for the sake of argument, that the freedmen, under the treaty of '66, have an interest in all the common property of the Cherokee Nation, that nation, under the decisions of this court and the Supreme Court, the opinion of the Attorney General and the Secretary of the Interior, has a perfect right to make such disposition of its lands and moneys as it may see fit and proper, whether affecting members by blood or adoption, and there is no right or power vested or reserved in the United States to interfere. As a matter of fact, if we apply the principles land down by the courts, the Attorney General, and the Secretary of the Interior, which recognize the absolute unrestricted right of self-government in the Cherokee Nation as to its internal affairs, and the right guaranteed to that nation 'to make and carry into effect all such laws as they may deem necessary for the government of the persons and property within their own country belonging to their own people or such persons as have connected themselves with them,' then the United States Government has no more

control over the public property of that nation or the action of its legislature in connection therewith than it has over the public property or legislative acts of a State or Territory."

These propositions are in the abstract sound—are indeed incontrovertible. But the trouble with their application to the present case is, 1st. That the legislative authority of the national council is not absolute, but is limited and defined by the constitution of the nation; 2d. That its action cannot control or abrogate the treaty obligations of the nation to the United States.

The United States did not, it may be conceded, stipulate for more than that the freedmen should become citizens "with all the rights;" that is, political rights, "of native Cherokees," and that "all laws of the Cherokee Nation shall be uniform throughout said na-
49 tion," and that the President of the United States should have the power to secure to the freedmen "a fair and equitable application and expenditure of the national funds;" but the constitution of the Cherokee Nation then came into the case and defined what citizenship was, and in express terms ranked "freedmen" with "native-born Cherokees" and the lands of the nation as "common property." If those lands had remained common property, unsold, and held for governmental purposes, it seems incontrovertible that all classes of citizens, Cherokees by blood and Cherokees by adoption, would have been, as citizens, equally and mutually entitled to the national benefits which might be derived from them. And to the court it seems equally incontrovertible that when the national council saw fit to change the lands into money, the fund took the place of the lands and was subject to the same limitations and existed for the same beneficiaries. Primarily it existed for national purposes, the construction of roads, the erection of public buildings, the endowment of schools, and the abatement of taxation—for those objects which are comprehended in the term "the general welfare." The national council did not and could not divert the common property of the nation from the general welfare and transmute it at will into a communal fund belonging to a class of citizens. If the fund retained the characteristic of the lands, that of common property, it necessarily was the common property of all.

It is possible that there still exists, or hereafter may be revived, a species of property which is an exception to the previously expressed conclusions of the court. To prevent future misapprehension and complication this will now be noted.

The United States have repeatedly recognized in their transactions with the Cherokees the dual character of the people, sometimes national, sometimes communal. They have also recognized portions of the people as distinct communities. In 1835 they so dealt with the Georgia Cherokees as communal owners, setting apart a portion of the purchase money of their lands for national purposes, but paying part to them per capita. In 1846 they so dealt with the Western Cherokees, segregating them from the mass of their countrymen and paying them individually, a community within a community. In 1866, and

by the very treaty which lies at the foundation of this suit, they recognized the Delawares as communal owners of a fund in the Treasury. For though the Delawares were to be merged in the Cherokee Nation and become Cherokee citizens, and contribute to the Cherokee fund, nevertheless there was to remain in the Treasury a portion of the Delaware fund which would not pass to the nation for national purposes, but would continue to be the separate property of a people who were no longer to be a body politic, a nation, but who, so far as the ownership of the fund was concerned, were still to be communal owners. Still later the United States have recognized the continued existence of these communities by allowing them to bring actions in this court in regard to their communal property. (Eastern Cherokees v. The United States, 20 C. Cls. R., 449; Western Cherokees v. Same, 27 id., 1; Shawnees v. Same, 28 id., 447; Delawares v. Cherokee Nation, 28 id., 281.) The claimants now ask the court to decree that the freedmen are entitled to participate with all the other members of the nation in all of the remaining common property upon equal terms with the other members of the nation. The court is not informed whether there still exists funds or annuities which were
50 originally treated as communal by distribution per capita and not as national by being set apart for school purposes, charitable uses, etc. If there should be such a fund, it is the opinion of the court that its original character continues, and that it must be regarded as belonging to that community or portion of the Cherokee people who are or were entitled to be paid its proceeds per capita, whether they were those formerly known as Western Cherokees, Delawares, and Shawnees, or those now known as "Cherokees by blood." Payment per capita must be regarded as the badge or recognition of an individual communal interest as distinguished from a governmental or national ownership. Such funds are not "common property" within the intent of the Cherokee constitution, but trust estates in the custody of the United States for the benefit of designated individuals or communities. Over them the Cherokee government has no legitimate control, and in them the freedmen have no estate or interest.

The agreed statement of facts upon which the case has been considered sets forth the various funds which have been distributed in whole or in part among those who are "Cherokees by blood," but does not inform the court of the number of persons who were entitled to participate, or of the number of persons who constitute the body of the present claimants. Until that information is spread before the court a final decree determining definitely the rights and liabilities of the parties litigant can not be entered. The court will entertain the suggestions of counsel as to how the requisite information shall be obtained; and in the meantime, and until the further order of the court, the entry of judgment is suspended.

NOTE.—March 18, 1895. The opinion of the court by Chief Justice Nott in this case, in volume No. 30 of the Court of Claims Reports, pages 181 to 196, is hereby made a part of this record.

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Subsequent proceedings in the case.

On May 6, 1895, the court filed findings and fact and conclusion of law and decree.

On July 20, 1895, the defendants filed a motion for rehearing and also filed an application for appeal from the judgment rendered May 6, 1895.

On July 23, 1895, the claimants filed an application for an appeal.

On November 30, 1895, the defendants filed a motion for a new trial.

On January 30, 1896, the above applications of the defendants and claimants were withdrawn by leave of court.

On February 3, 1896, the decree entered May 6, 1895, was vacated and a new decree entered of which the following is a copy:

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Order and decree of February 3, 1896.

Court of Claims.

MOSES WHITMIRE, TRUSTEE FOR THE FREEDMEN OF THE CHEROKEE NATION,
v.
THE CHEROKEE NATION AND THE UNITED STATES. } No. 17209.

It appearing that since the entry of the decree filed May 8, 1895, and defendant, the Cherokee Nation, has filed motions for a rehearing and new trial, and an application for an appeal from said decree to the Supreme Court, which motions have not been heard and which application for an appeal has not yet been allowed; and it appearing that both parties are desirous of avoiding further litigation and have agreed that if the court shall see fit to modify said decree, it will be accepted as final.

Now, on motion by the attorney for the complainant, the defendant consenting thereto, it is ordered that the said decree be vacated and set aside and that the following decree be entered as to the final decree in this case.

Court of Claims.

MOSES WHITMIRE, TRUSTEE FOR THE FREEDMEN OF THE CHEROKEE NATION,
v.
THE CHEROKEE NATION AND THE UNITED STATES. } No. 17209.

At a sitting of the Court of Claims in the city of Washington, this 3d day of February, 1896.

This cause coming on to be heard upon the amended petition, answer, agreed facts, proofs, and arguments submitted by the parties respectively, and the court having heard the same and considered

the just rights in law and equity of the freedmen of the Cherokee Nation, including all persons who had been liberated by voluntary act of their owners, or by law, and all free colored persons who resided in the Cherokee country at the commencement of the rebellion and resided therein July 19, 1866, or returned thereto within six months thereafter, and their descendants who are settled and incorporated into the Cherokee Nation, in pursuance of the authority vested in the court by act of Congress entitled "An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes," approved October 1, 1890.

And it appearing to the court that under the provisions of article 9 of the treaty of July 19, 1866, made by and between the Cherokee Nation and the United States, the said freedmen, who had been liberated by voluntary act of their former owners or by law, and all free colored persons who resided in the Cherokee country at the commencement of the rebellion and were residents therein at the date of said treaty, or who had returned thereto within six months of said last-mentioned date, and their descendants, were admitted into and became a part of the Cherokee Nation and entitled to equal
53 rights and immunities, and to participate in the Cherokee national funds and common property in the same manner and to the same extent as Cherokee citizens of Cherokee blood.

It further appearing to the court that under and by virtue of an act entitled "An act making appropriations for current and contingent expenses, and for fulfilling treaty stipulations with Indian tribes, for the fiscal year ending June 30, 1894," approved March 3, 1893, it was provided for the payment to the Cherokee Nation of the sum of $8,595,736, the same to be in full consideration of all the right, title, interest, and claim which said nation might have in the lands lying west of 96 degrees west longitude, commonly known as the Cherokee Outlet, and it further appearing that of the said sum of $8,595,736 the sum of $295,736 was appropriated by said act out of the Treasury of the United States and made immediately available, and that the balance thereof, to wit, $8,300,000, was made payable in five annual installments, the first to be payable on the 4th of March, 1895, and all deferred payments to bear interest at the rate of 4 per cent per annum; and that a sufficient amount of the money provided in said act should be paid for the purchase of said Cherokee Outlet to pay the Delawares and Shawnees their pro rata share of said outlet and which should remain in the Treasury of the United States until the status of said Delaware and Shawnee Indians should be determined by the courts of the United States before which their suits were then pending; also a sufficient amount to pay the freedmen who are Cherokee citizens, as the same shall be determined by the courts; and the said act further providing that if the legislative council of the Cherokee Nation should deem it more advantageous to their people they might issue a loan for the principal and interest of the deferred payments, pledging said amounts of interest and

principal to secure payment of such debt; and it appearing to the court that said Cherokee Nation has borrowed from the Union Trust Company of New York the sum of $6,640,000 and pledged as security therefor the four payments as aforesaid, falling due after the 4th day of March, 1895, and that the payment falling due on the said 4th of March, 1895, amounting to $1,660,000, has been retained in the Treasury of the United States from which to pay the Delawares, Shawnees, and freedmen, as hereinbefore set forth; and it further appearing to the court that the said $6,640,000, so borrowed by the Cherokee Nation, has been distributed to the Cherokee citizens of Cherokee blood, to the exclusion of the complainants, the aforesaid freedmen and free colored persons and their descendants, as well as the two funds of $300,000 each distributed by the act of the Cherokee council of date April 26, 1886, and November 25, 1890, as charged in the amended petition in this case.

It is ordered, adjudged, and decreed that so much of the acts of the Cherokee national council of date April 26, 1886, November 25, 1890, and May 3, 1894, as restricts the distribution of funds which were derived from the public domain and from the sale of lands by the Cherokee Nation to the Government of the United States, to citizens of the nation by blood, be held and decreed void and contrary to and in derogation of the constitution of the Cherokee Nation and the provisions and stipulations of article 9 of the aforesaid treaty of July 19, 1866, with respect to the rights of
54 said freedmen, who have been liberated by voluntary act of their former owners or by law, and all free colored persons who resided in the Cherokee country at the commencement of the rebellion and who on the said date resided therein, or who returned thereto within six months thereafter, and their descendants; and that the said Cherokee Nation or its trustees, the United States, account for, render, and pay to the aforesaid freedmen and free colored persons and their descendants, out of any funds of the said nation in its national treasury, or in the custody of the United States as trustee, or held by agreement between said nation and the United States for the purpose of satisfying the decree herein rendered, not specifically appropriated by law to other purposes, or out of funds which may hereafter come to the possession of said trustee belonging to the Cherokee Nation a sum equal to the aggregate amount which said freedmen and free colored persons and their descendants would have received if the before-mentioned void and unconstitutional restrictions in said statutes had not existed.

And it is further adjudged and decreed that the complainants in this suit and those whom they represent, being the freedmen and free colored persons aforesaid, and their descendants living and in being on the 3d day of May, 1894, are entitled to participate hereafter in the common property of the Cherokee Nation in the same manner and to the same extent as Cherokee citizens of Cherokee blood or parentage may be entitled, and that in the distribution of the proceeds and avails of the public domain or common property

of the nation among the citizens thereof by distribution per capita at any time hereafter, the defendant, the Cherokee Nation, and the defendant, the United States, as trustee of the Cherokee Nation, be enjoined and prohibited from making any discrimination between the Cherokee citizens of Cherokee blood or parentage and Cherokee citizens who are or were freedmen who had been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the Cherokee country at the commencement of the rebellion, and were residents therein at the date of said treaty, or who returned thereto within six months thereafter and their descendants, to the prejudice of the latter.

It being understood that the freedmen and their descendants and free colored persons above referred to shall include only such persons of said class as have not forfeited or abjured their citizenship of said Cherokee Nation at the date of the entering of this decree.

And it is further adjudged and decreed with respect to the participation of said freedmen and free colored persons aforesaid and their descendants in the three funds referred to in the three statutes of the Cherokee Nation hereinbefore declared to be void and unconstitutional, that the Cherokees by blood having received a sum which amounts at the date hereof to $7.240,000, in which the said freedmen and free colored persons aforesaid and their descendants were entitled to have and participate in the distribution of said sum; and for the purpose of fixing an amount thereof which ought to be distributed among said freedmen and free colored persons and their descendants, it is further adjudged and decreed that said freedmen and free colored persons and their descendants are entitled to have and receive the sum of $903,365 out of the sum last aforesaid, after deducting
55 the amounts hereinafter allowed and decreed to be paid to the trustee herein as his compensation for services as trustee and the attorney of record of the complainant herein, and the other expenses incident to the ascertainment and payment of the complainants, the freedmen, as hereinafter provided, such balance remaining to be paid by the Secretary of the Interior to the freedmen and free colored persons aforesaid and their descendants, per capita, who would have been entitled to receive the same if the unconstitutional restrictions and discriminations in said statutes had not existed. Such payments to be made upon a roll of said freedmen and free colored persons and their descendants as prepared and approved by the Secretary of the Interior in accordance with provisions hereinafter set forth in this decree.

And it is further ordered and adjudged that for the purpose of ascertaining and determining who are the individual freedmen of the Cherokee Nation now entitled to share in the distribution of the said sum of $903,365, the Secretary of the Interior be authorized to appoint three commissioners, one on the nomination of the complainant and one on the nomination of the defendant, the Cherokee Nation, but both nominations to be approved by him, to proceed to the Cherokee country and hear the testimony both for and against the identity

of all freedmen, free colored persons and their descendants, claiming to be entitled to share in the distribution of said $903,365, that may be offered by the respective parties to this suit; and that each of said parties shall be entitled to be represented before said commissioners, either at the taking of testimony in the Cherokee country or elsewhere; and that the said commissioners in ascertaining the identity of the freedmen entitled to share under this decree shall accept what is known as the authenticated Cherokee roll, the same now being on file in the office of the Secretary of the Interior, having been furnished to him and purporting to have been taken by the Cherokee Nation in 1880, for the purpose of showing the number of freedmen then entitled to citizenship in the said nation under the terms of the treaty between the United States and the Cherokee Nation, hereinbefore referred to, and their descendants; and the said commissioners shall ascertain who of said persons named on said roll were alive and what descendants of said persons were alive on May 3, 1894, and no evidence shall be accepted by said commission tending to disprove the citizenship of any of the persons whose names appear upon said roll.

And it is further ordered and directed that when the foregoing roll so reported by the said commissioners shall be approved by the Secretary of the Interior he will cause the amount remaining of the fund of $903,365, after deducting the costs and expenses herein directed to be paid by the complainants, to be paid and distributed to the persons entitled thereto, such payments, however, not to exceed $256.34 per capita, and the cost of such distribution and payment likewise being a charge upon the fund of the complainants so to be distributed pursuant to the act of March 2, 1895, section 11.

And it is further directed that the amount of $6,500, or so much thereof as may be necessary, is hereby allowed for the compensation of the said commissioners and the necessary costs and expenses incidental to the ascertainment of the individual complainants by them as hereinbefore provided; and it is hereby adjudged that one-
56 half of such compensation and expenses shall be paid by the complainants and deducted from the recovery in this suit, and that the remaining one-half part of such compensation and expenses shall be paid by the defendant, the Cherokee Nation, in addition to the costs hereinafter adjudged against the said defendant. And the Secretary of the Interior is authorized to fix the compensation of said commissioners and to advance for the necessary and immediate expenses of making the rolls as hereinbefore provided such amount as he may deem advisable.

There is further adjudged and decreed to Robert H. Kern, the attorney of record for complainant, for compensation and counsel fees, including the compensation of all associate counsel and the expenses and disbursements incident to the litigation, 2 per cent of the amount of the recovery, to wit, $18,067.30, which amount it is adjudged shall be paid by the Secretary of the Treasury of the United States to the said Robert H. Kern out of the funds hereinbefore men-

tioned, now in his hands, and that the same when so paid shall be charged to the defendant, the Cherokee Nation.

And there is further decreed and adjudged to the said Robert H. Kern, attorney of record of the complainants, for compensation and counsel fees, including the compensation of all associate counsel and the expenses and disbursements incident to the litigation, 4 per cent upon the amount of the recovery, to wit, $36,134, which amount it is adjudged shall be paid by the Secretary of the Treasury of the United States out of the funds hereinbefore mentioned, now in his hands, and shall be a charge against the freedmen of the Cherokee Nation and paid out of the funds hereinbefore awarded to them.

It is further adjudged and decreed that Moses Whitmire, as trustee of the complainants, be allowed for compensation for his services as such, including expenses and disbursements made by him, the sum of $5,000, which amount it is adjudged shall be paid to said trustee by the Secretary of the Treasury of the United States out of the funds hereinbefore mentioned, now in his hands, and shall be a charge against the freedmen of the Cherokee Nation and paid out of the funds hereinbefore awarded to them.

And the complainant having represented that the number of the freedmen entitled to distribution is not less than 3,524, it is further ordered that if said number of persons entitled to distribution shall not equal that number the payments made shall not exceed $256.34 per capita, and that any balance of the amount hereby decreed to said plaintiffs, and not consumed in the per capita payment herein provided for, shall be paid over to the Cherokee Nation as other moneys provided for in the agreement between said nation and the Secretary of the Interior hereinbefore referred to.

It is further adjudged that the Secretary of the Interior pay the aforesaid amount decreed to be paid by him out of the aforesaid funds now in the Treasury Department of the United States.

And it is further ordered, adjudged, and decreed that the defendant, the Cherokee Nation, pay the costs of this suit, as above provided, and that if this judgment and decree be not carried out and satisfied within six months from the date hereof the claimant may apply to this court for such further order, relief, or remedy as the plaintiff herein may deem necessary, and that if any further proceeding be had under this decree, the rights of the attorneys and
57 counsel for the plaintiff herein to further costs and allowances be reserved to be hereafter determined and fixed by the court, and the court reserves the right to make all such further orders in aid hereof as to it may seem meet.

It is hereby stipulated and agreed on the part of the complainant and on the part of the defendant, the Cherokee Nation, that the foregoing decree be entered in this case in the place and stead of the decree entered and filed May 8, 1895, in this case, and that it be entered nunc pro tunc as of that date, to wit, May 8, 1895, and that the application for an appeal filed by the complainant and the application for an appeal and motions for a rehearing and for a new trial

filed by the said defendant be mutually withdrawn upon the entry of this corrected decree.

Dated Washington, February 3, 1896.

ROBERT H. KERN,
Attorney for the Complainant.
E. C. BOUDINOT,
MAXWELL & CHASE,
Attorneys for the Cherokee Nation.
S. H. MAYES,
Principal Chief of the Cherokee Nation.

The defendants, the United States, offer no objection to the entry of the amended decree as provided in this stipulation.

_____ _____,
Assistant Attorney General.

58 *Order of court of February 18, 1896.*

COURT OF CLAIMS,
Washington, February 18, 1896.

Hon. DANIEL M. BROWNING,
Commissioner of Indian Affairs.

SIR: The court is informed that the Commissioner of Indian Affairs desires its opinion in regard to the fifth of the proposed instructions referred for the consideration of the Secretary of the Interior February 15, 1896.

The decree in this case follows and refers to Article IX of the treaty with the Cherokee Nation July 19, 1866, and the persons therein designated are the complainants in this case, entitled to payment under the decree.

The court is of the opinion that the clauses in that article in these words, "And are now residents therein, or who may return within six months, and their descendants," were intended, for the protection of the Cherokee Nation, as a limitation upon the number of persons who might avail themselves of the provisions of the treaty, and consequently that they refer to both the freedmen and the free colored persons previously named in the article; that is to say, freedmen and the descendants of freedmen who did not return within six months are excluded from the benefits of the treaty and of the decree.

The court is also of the opinion that this period of six months extends from the date of the promulgation of the treaty, August 11, 1866, and consequently did not expire until February 11, 1867.

WM. A. RICHARDSON, *Chief Justice.*

59 *Petition of Robert H. Kern for instructions. Filed April 14, 1896, and order of court therein, filed April 15, 1896.*

The undersigned respectfully represents that he has spent the last few weeks in the Cherokee Nation with a view of having the case of the freedmen prepared for presentation to the commission. That

he finds that in many instances the former slaves of the Cherokee Nation during the rebellion were taken from that country by their then owners, the Cherokees, to the far Southern States and in some instances to Old Mexico. That at the conclusion of the war some of these slaves who had enlisted in the Union Army were disbanded at various points of the Union far away from the Cherokee country. That both of these classes of freedmen were left at these various points penniless and ignorant, but with no intention of abandoning their residence in the Cherokee country. That as soon as possible they returned to the Cherokee country, but some of them not within the six months' limitation specified in the treaty. That these people have resided there continuously since and been as good citizens as that country has. That Secretary Noble when the Wallace roll was taken instructed Wallace to enumerate this class of people, and that was done. That in the judgment of the undersigned the number of such people is only a few hundred and that it is the belief of the Interior Department, as well as of the undersigned, that to exclude people of this class would be contrary to the spirit of the treaty and would be a bone of contention in the Cherokee Nation. That justice to all parties would be best subserved by leaving it in the discretion of the commissioners in taking testimony under the decree of this court to allow such persons to be enrolled.

The undersigned has been summoned here by the Secretary for a conference in reference to the instructions to guide the commis-
60 sioners, and that whilst he has seen the letter of Judge Nott in reference to this construction—but he feels that this was perhaps given by the court without its being aware of the fact above stated—he feels his duty to his clients' demands that he should ask the court for its advice as to an instruction of this character, and he submits herewith the form of an instruction which he thinks the Secretary would cheerfully give if approved by the court. (Paper marked "Exhibit A.")

The undersigned further states that he found in the Cherokee country a large number of lawyers proposing to represent the freedmen before this commission and making extravagant contracts with them. That he thereupon assumed to notify the freedmen that the decree in the case contain the following provision: "That each of said parties shall be entitled to be represented before said commissioners, either at the taking of testimony in the Cherokee country or elsewhere." That he had that provision inserted in the decree so as to enable the trustee to employ counsel to represent the freedmen before the commission. That thereupon he agreed with the freedmen to present the construction of this provision to the court and to the Secretary; that he felt satisfied that they would decide that it was the duty of the trustee to employ an attorney to take full charge of the freedmen's case before the commission. That in his judgment this should be done, but that the trustee will not do so unless he is advised that he can pay such attorney a reasonable compensation for his services out of the funds in this case. That the Cherokees have

employed two of the ablest lawyers in the nation to represent them, and he would respectfully ask the advice of the court in this matter so the same may be suggested to the Secretary of the Interior.

All of which is respectfully submitted.

ROBERT H. KERN.

61

EXHIBIT "A."

In making the investigations prescribed in said decree it shall confine itself to the identity of the following classes or persons only:

1. All persons who had been held in bondage by any member of the Cherokee Nation and who had been liberated by act of law or by voluntary act of their owners, and the descendants of such, as provided in the terms of the treaty of July 16, 1866, and if it shall appear to said commission that any person or persons of the aforesaid class had been taken from the Cherokee Nation during the rebellion either by the owners thereof, or was absent therefrom during said time because of his or their belonging to either of the armies that were engaged in the late rebellion, and were unable to return to the Cherokee Nation within six months after the conclusion and ratification of the treaty referred to in the decree in said cause of date July 16, 1866, because of circumstances beyond their control, but returned as soon as practicable, then no such person shall be excluded by said commission from the roll to be prepared by it, but the same shall be placed thereon, as well as the descendants of such.

2. All free colored persons who were in the Indian Territory at the commencement of the rebellion and were residents thereof at the time of the treaty of July 16, 1866, or who returned thereto within six months after the conclusion and ratification of said treaty.

3. All of the aforesaid classes who were residents of the Cherokee Nation on May 3, 1894.

Order of court on foregoing petition for instructions. Filed April 15, 1896.

The court is of the opinion that the act 2nd March, 1895 (28 Stat. L., p. 910, sec. 11), prescribes the manner in which payments per capita shall be made, and that the matter of payment is exclusively within the jurisdiction of the Secretary of the Interior.

The court, after further consideration, adheres to the opinion communicated to the Commissioner of Indian Affairs, February 18, 1896. The within motion for instructions is overruled.

By the court:

WM. A. RICHARDSON, *Chief Justice.*

62 *Motion to substitute trustee and to file supplemental petition. Filed September 30, 1907.*

Now come the claimants, the freedmen of the Cherokee Nation, and by Robert H. Kern, their attorney of record, and suggesting the death of Moses Whitmire, their trustee in this behalf, move the court

to appoint as their trustee in his place and stead, Jacob B. Wilson, one of their number, selected by them for that purpose; and claimants further move the court for an order granting them leave to file in this cause the supplemental petition which accompanies this motion.

ROBERT H. KERN,
Attorney for Claimant.

SAMUEL H. PUTNAM,
CHARLES POE,
Of Counsel.

63 *Minutes of meeting of freedmen filed with the foregoing motion. Filed September 30, 1907.*

At a public meeting of the freedmen of the Cherokee Nation, who were enrolled as citizens of the Cherokee Nation by virtue of the final decree rendered in the Court of Claims of the United States at Washington, D. C., in the case of Moses Whitmire, trustee of the freedmen of the Cherokee Nation *vs.* The Cherokee Nation and the United States, held at Lenapah, I. T., May 29, 1907, and who were denied citizenship and enrollment by the Secretary of the Interior Department of the United States, acting under what is known as the Curtis Act, held pursuant to notice issued by the freedmen of the Cherokee Nation, calling said meeting, a true copy of which notice is herewith filed, marked "Exhibit A," the original of said notice having been publicly posted in said Cherokee Nation, prior to said meeting, the following resolution was unanimously adopted:

"Whereas the freedmen being of the class above indicated and advised by competent attorneys that error was made in their being denied enrollment as above stated; and whereas they are further advised that litigation to determine said question should be commenced in the Court of Claims of the United States at Washington, D. C., in the name of the trustee for said freedmen, and in accordance with the terms of the decree rendered in the aforesaid case in said court; and whereas Moses Whitmire, who acted as trustee for said freedmen in said cause, has died since the decree was entered therein; and whereas the selection of a trustee to act in his stead is deemed necessary by the freedmen herein assembled and by the legal attorneys acting for such:

"Now, therefore, it is moved and seconded that Jacob B. Wilson be elected to act as trustee for said freedmen in lieu of said Moses Whitmire, deceased, to act as said trustee in behalf of said freedmen in any and all litigations that may be deemed necessary to secure the enrollment of the aforesaid freedmen, who have been rejected

64 as aforesaid; and that Nelson Grubbs be elected secretary of said meeting and be instructed to forward a duly certified copy of this resolution to the Secretary of the Interior Department, and to the attorneys of the freedmen as aforesaid."

"EXHIBIT A."

Notice is hereby given that a mass meeting of the freedmen of the Cherokee Nation, who were enrolled under the decree in the case of Moses Whitmire, trustee of the freedmen of the Cherokee Nation, *vs.* Cherokee Nation and the United States in the Court of Claims of the United States at Washington, D. C., and who were refused enrollment under the Curtis Act by the Secretary of the Interior Department of the United States, will hold a mass meeting on the 29 day of May, 1907, at 2 p. m. hour of that day, at , in the Cherokee Nation, for the purpose of electing a trustee to act in the above cause in any litigation that may be necessary therein, to determine the rights of the said rejected freedmen, in the place of Moses Whitmire, deceased. All such freedmen are invited to be present and act in the election of such trustee.

JACOB B. WILSON,
FRANK ROSS,
ALEX. FREEMAN,
GEORGE VANN,
C. C. SMITH,
M. A. SORRELL,
FRANK DANIEL,
JOSHUA DUFFIN,
SQUIRE WARD,
ANDY WEBBER,
Freedmen Committee.

65 At a public meeting at Lenapah, Ind. Ter., May 29th, 1907, of the freedmen of the Cherokee Nation, who were enrolled as citizens of the Cherokee Nation by virtue of the final decree rendered in the Court of Claims of the United States, at Washington, D. C., in the case of Mose Whitmire, trustee of the freedmen of the Cherokee Nation, *vs.* The Cherokee Nation and the United States, and who were denied citizenship and enrollment by the Secretary of the Interior Department of the United States, acting under what is known as the Curtis Act, held pursuant to notice issued by the freedmen of the Cherokee Nation calling said meeting, a true copy of which notice is herewith filed as and marked "Exhibit A," the original of said notice having been publicly posted in said Cherokee Nation prior to said meeting, the following resolution was unanimously adopted:

"Whereas the freedmen being of the class above indicated and advised by competent attorneys that error was made in their being denied enrollment as above stated; and whereas they are further advised that litigation to determine said question should be commenced in the Court of Claims of the United States, at Washington, D. C., in the name of the trustee for said freedmen and in accordance

to the terms of the decree rendered in the aforesaid case in said Court of Claims; and whereas Moses Whitmire, who acted as trustee for said freedmen in said cause, has died since the decree was entered therein; and whereas the selection of a trustee to act in his stead is deemed necessary by the freedmen herein assembled and by the legal attorneys acting for such:

"Now, therefore, it is moved and seconded that Jacob B. Wilson be elected to act as trustee for said freedmen in lieu of said Moses Whitmire, deceased, to act as trustee in behalf of said freedmen in any and all litigations that may be deemed necessary to secure the enrollment of the aforesaid freedmen who have been rejected as aforesaid freedmen, and that Nelson Grubbs be elected as secretary of said meeting and be instructed to forward a duly certified copy of this resolution to the Secretary of the Interior Department and to the attorneys of the freedmen as aforesaid."

66 I, the undersigned secretary of the aforesaid meeting, hereby certify that the foregoing is a true copy of the resolution adopted at a meeting of the freedmen of the Cherokee Nation, called in accordance with notice hereto annexed, marked "Exhibit A," and I certify that the same as secretary of said meeting.

NELSON GRUBBS, *Secretary.*

LENAPAH, IND. TERRITORY, *May, 29, 1907.*

67 *Argument and submission of motion to substitute trustee and file supplemental petition.*

On January 20, 1908, the motion to substitute trustee and file supplemental petition was argued by Mr. Robert H. Kern and Mr. Samuel H. Putman for the motion, and Mr. William W. Hastings and Mr. George M. Anderson in opposition thereto, and the motion was submitted.

68 *Order of court allowing motion to file supplemental petition and substitute trustee.*

Order.

The claimant's motion to file supplemental petition and to substitute trustee is allowed, reserving all questions, including the matter of jurisdiction.

BY THE COURT.

Filed April 20, 1908.

commissioners shall ascertain who of said persons named in said roll were alive and what descendants of said persons were alive on May third, eighteen hundred and ninety-four, and no evidence shall be accepted by said commissioners tending to disprove the citizenship of any of the persons whose names appear upon said roll."

After the passage of said decree commissioners were appointed by this honorable court as therein provided and made a roll of said freedmen in strict compliance with the terms of said decree, which was filed with the Secretary of the Interior.

III.

After the making and approving of said roll of freedmen as above described, Congress by the act of June 28, 1898 (30 Stat. L., 495), provided for allotment by a commission, known as the Dawes Commission, of lands belonging to the Cherokee Nation among other
73 Indian nations, to the citizens thereof, and by section 21 of said act provided for making rolls of citizenship by said commission in the following manner:

"SEC. 21. That in making a roll of citizenship of the several tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take the roll of Cherokee citizens of 1880 (not including freedmen) as the only roll intended to be confirmed by this and preceding acts of Congress, and to enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll to persons whose names are found thereon; and all persons who have been enrolled by the tribal authorities, who have heretofore made permanent settlement in the Cherokee Nation, whose parents, by reasons of their Cherokee blood, have been lawfully admitted to citizenship by the tribal authorities and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to citizenship under Cherokee laws.

"It shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six."

IV.

Thereafter Congress by act of July 1, 1902 (32 Stat. L., 716), made further provision for the allotment of the lands of said Cherokee Nation in severalty and the distribution of all of its
74 assets to its citizens. At the time of the passage of this act the Cherokee Nation owned about four and a half million acres of land in the Indian Territory and there was to its credit in the

Treasury of the United States a sum amounting to more than $2,900,000.00, to which fund large sums have since been and others are to be added, and the Secretary of the Interior is now allotting or preparing to allot said lands to the citizens of the Cherokee Nation and is now distributing or preparing to distribute to said citizens all of its said assets.

V.

The said act of July 1, 1902 (32 Stat. L., 716), contained the following provisions relative to a roll of citizenship of the Cherokee Nation:

"SEC. 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

"SEC. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled, as provided in section twenty-five hereof, shall be placed upon the roll made by said commission, and no child born thereafter to a citizen, and no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.

75 "SEC. 27. Such rolls shall in other respects be made in strict compliance with the provisions of section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (30 Stat., page 495), and the act of Congress approved May thirty-first, nineteen hundred (31 Stat., page 221)."

VI.

Thereafter the said commission, commonly called the Dawes Commission, made up rolls of the citizens of the Cherokee Nation, but not in strict compliance with the provisions of section 21 of the act of Congress approved June 28, 1898 (30 Stat. L., 495), hereinbefore recited, nor in strict compliance with the decree of this honorable court passed in this cause February 3, 1896, and petitioner alleges that the particular in which it fails to conform to the said act of Congress and decree of this court is that it has excluded from its rolls more than twelve hundred freedmen who were placed upon the rolls under the order and decree of this court of February 3, 1896, and their descendants, most of whom had also been on said authenticated roll of 1880. Your petitioner further alleges that many of said freedmen who are thus wrongfully omitted from the rolls of said nation had taken homes upon the lands of said nation and improved them; that since the return of the said rolls of the Dawes Commission the Secretary of the Interior has denied their citizenship in the Cherokee Nation and has denied their right to the continued posses-

sion and enjoyment of their said homes and their right to participate in the allotment of said lands and the distribution of said funds and assets and has in many cases allotted the homes of such individual freedmen to other members of the Cherokee Nation and has
76 ousted many of such freedmen from their homes and is now preparing to oust the remainder of said freedmen from their said homes, all of which he will carry into effect unless he is prevented by appropriate order of this honorable court. Your petitioner further alleges that in the allotment and distribution made or preparing to be made by the Secretary of the Interior, as hereinbefore set out, said freedmen are and will be excluded from any participation whatever in the lands, assets, and funds of the Cherokee Nation in disregard of the said acts of July 1, 1902, June 28, 1898, and in violation of the injunction contained in the decree of this honorable court passed February 3, 1896, which provides that—

"In the distribution of the proceeds and avails of the public domain or common property of the nation among the citizens thereof by distribution per capita at any time hereafter, the defendant, the Cherokee Nation, and the defendant, the United States, as trustee of the Cherokee Nation, be enjoined and prohibited from making any discrimination between the Cherokee citizens of Cherokee blood or parentage and Cherokee citizens who are or were freedmen, etc."

The premises considered, your petitioner prays that this honorable court will pass a decree declaring the action of the said Dawes Commission and the Secretary of the Interior, whereby the names of said freedmen were excluded from the roll and citizenship of the Cherokee Nation, be declared to be unlawful, and further enjoining and prohibiting the defendants, the Cherokee Nation, and the United States, as trustee for the Cherokee Nation, from making any discrimination between the said freedmen and other citizens of the
77 Cherokee Nation in the allotment of lands and distribution of the said property and assets of said nation, and further enjoining the said defendant, and particularly the United States, acting through the Secretary of the Interior, from further disturbing said freedmen in the possession and occupation of their said homes and improvements, and further enjoining upon the said defendant, the United States, acting through the Secretary of the Interior, to reinstate such of said freedmen as have heretofore been ousted from the occupancy and possession of their said homes and improvements.

JACOB B. WILSON,
Trustee for Freedmen of the Cherokee Nation.
Per ROBERT H. KERN,
His Attorney.

STATE OF OKLAHOMA, *Nowata County.*

Before me, Frank H. Akright, a notary public in and for said county and State, personally appeared Jacob B. Wilson, who, being duly sworn by me, on oath says that he has read the foregoing petition and knows the contents thereof; that the allegations therein

made, when made upon information and belief, he believes to be true, and when made upon his knowledge, are true.

JACOB B. WILSON.

Sworn to and subscribed before me this 29th day of April, 1908.

[SEAL.] FRANK H. AKRIGHT,
Notary Public.

My commission expires Jan. 2, 1910.

78 EVIDENCE FOR CLAIMANTS AND DEFENDANTS.

79 *Report of Senate committee on bill which afterwards became act of October 1, 1890.*

In the Senate of the United States.

AUGUST 28, 1890.—Ordered to be printed.

Mr. DAWES, from the Committee on Indian Affairs, submitted the following

REPORT:

[To accompany S. 4354.]

The Committee on Indian Affairs, to whom was referred the bills S. 2321, S. 2322, and S. 4005, submit the following report:

The substitute bill here submitted provides for the reference to the Court of Claims for adjudication of the subject matter embraced in the original bills.

The history and basis of these claims, as set out and provided for in sections 1, 2, and 3 of the bill, are as follows:

"Prior to the year 1866 the Cherokee Nation of Indians claimed and possessed a tract of country in the Indian Territory bounded on the north by the State of Kansas, on the east by the States of Missouri and Arkansas, and on the south by the Choctaw, Creek, and Seminole Nations of Indians.

"On the 19th day of July, 1866, the Cherokee Nation made and entered into a treaty with the United States, and among other things the contracting parties stipulated and provided in article 15: (1) That the United States may settle civilized Indians, friendly with the Cherokees and adjacent tribes, on unoccupied lands east of the ninety-sixth degree west longitude in the Cherokee Nation; (2) on such terms as may be agreed upon by the tribes and the Cherokees

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and approved by the President of the United States, with the provision that the tribes settling should abandon their tribal organizations and pay into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokees then residing in the Cherokee country; and on compliance the Indians settling shall be incorporated into and ever after remain a part of the Cherokee Nation, 'equal in every respect with native citizens.'

"Article 16 of this treaty provides that the United States may settle friendly Indians in any part of the Cherokee country west of the ninety-sixth degree west longitude, to be taken in compact form and conveyed in fee simple to each of the tribes.

"Article 9 of this treaty provides that all freedmen who were liberated by voluntary act of former owners or by law, as well as free colored persons who were in the country at the commencement of the rebellion, and are now residents in the Cherokee Nation or who may return in six months, and their descendants, shall have all the rights of native Cherokees.

"On the 7th day of June, 1869, the Shawnees made an agreement with the Cherokee Nation, under the authority of the aforesaid fifteenth article yielding and paying to the Cherokee Nation $5,000 of their perpetual annuities and $50,000 in cash. For this payment of money the Cherokees agreed to receive the Shawnees into the Cherokee Nation on the unoccupied lands east of the ninety-sixth degree west longitude, and ever after remain a part of the Cherokee Nation on equal terms in every respect and with all the privileges and immunities of a native citizen of the Cherokee Nation, 'stipulating that the Shawnees who shall elect to avail themselves of the provisions of this agreement shall register their names and permanently locate in the Cherokee country within two years from the date of this agreement; otherwise they would forfeit all rights under this agreement.'

"This agreement was approved by the President on the 9th day of June, 1869, in the manner as is authorized by the aforesaid fifteenth article. And, to wit, 900 Shawnees complied with the provisions and conditions of this agreement, moved and settled in the Cherokee Nation.

"On the 8th day of April, 1867, the Delaware Indians made and concluded an agreement with the Cherokee Nation under the aforesaid article 15 of the treaty of 1866. In said agreement it is provided (1) that the Cherokee Nation will sell to the Delawares a quantity of land east of the ninety-sixth degree of west longitude in the Cherokee Nation, in aggregate equal to 160 acres for each individual Delaware who had been enrolled February 18, 1867, who should elect to remove to the Indian country. Names could be added by the Delaware council within a month after the signing of the agreement. (2) The Delawares agree to pay to the Cherokees for the land $1 per acre. Upon compliance with the stipulations and conditions of the agreement, the Delawares were to be incorporated into the Cherokee Nation, with the same rights and immunities and the same participation in the national funds as native Cherokees. And children thereafter born of such Delawares shall be in all respects regarded as native Cherokees.

"The agreement was ratified by the national committee June 15, 1867; and, to wit, fourteen hundred Delawares moved into the Cherokee Nation under the authority of this agreement.

"Referring to the freedmen claiming rights under the ninth article of the said treaty, it was ascertained that the census and roll recently taken, under the recent act of Congress, shows that there are over five thousand persons.

"From the time of making and entering into the aforesaid articles of the treaty and the agreements, up to May 19, 1883, the Shawnees, Delawares, and freedmen were accepted and recognized by the Cherokee Nation as Cherokee citizens with all the rights, benefits, and immunities of native Cherokees, as provided and obligated by the aforesaid treaty and agreements.

"About this time the Cherokee Nation received from the Government $300,000, appropriated by Congress out of funds due under appraisement of Cherokee lands west of the ninety-sixth degree west longitude. This money the Cherokee legislative council directed by an act to be paid out per capita to Cherokees by blood only in the Cherokee Nation.

"On July 5, 1883, the Cherokee Nation leased, rented, or granted to an association of persons, who are United States citizens, a permit to occupy and graze all of the vacant land belonging to the Cherokee Nation west of the ninety-sixth degree west longitude, or west of the Arkansas River in the Cherokee Nation. This lease was made to run for five years, at a rental of $100,000 per year. The act of the Cherokee national council authorizing this lease provided and promised that when $300,000 was paid into the Cherokee national treasury the amount should be paid out per capita as the council should direct. In May, 1886, this amount was paid into the Cherokee national treasury, and the Cherokee national council passed an act requiring the Cherokee national treasurer to pay the said money out per capita to Cherokee citizens by blood and descent only in the Cherokee Nation. This action deprived the Shawnees, Delawares, and freedmen out of their share and portion of this money. This payment was $15.50 per capita.

"At the same session of this council an act was passed and approved construing the rights of the Shawnees, Delawares, and freedmen. By this act the intention of the Cherokee Nation is clearly shown that the Cherokee Nation will not allow the Shawnees, Delawares, and freedmen to ever participate in the distribution of or the allotment of their lands west of the Arkansas River in the Cherokee Nation.

"The justification and defense the Cherokee Nation set up for their acts and these violations are as follows: (1) Because the amount paid by the Shawnees, Delawares, and freedmen is not adequate or equivalent under the provisions of the treaty; (2) because the lands west of the ninety-sixth degree west longitude, belonging to the Cherokee Nation, was set off, appropriated, and diverted for a specific purpose, before these agreements were entered into.

"This position of the condition of these people is by the committee regarded as serious and calculated to keep up and open contentions and hinder and obstruct the progress of these people; it is deemed best to provide a plan to settle the status of these people in the country, and their claims to their rights, by sending the matters of

dispute to the Court of Claims, and this plan is agreed to by the Cherokee delegates as well as the Shawnees."

* * * * * * *

[The balance of the report was devoted to the fourth section of the bill authorizing the Shawnees to bring suit against the United States for money belonging to them embezzled by an official of the Government, and has nothing to do with this case.]

Debate in Senate and House of Representatives on act of October 1, 1890.

On September 23, 1890, the bill came up again in the Senate, and upon inquiry as to its object and purpose Mr. Dawes, the chairman of the Committee on Indian Affairs of the Senate, said:

"Here are three different claims, the claims of the Delawares, the Shawnees, and the freedmen. The Delawares and Shawnees claim under the treaty with the Cherokees equal rights with the Cherokees in all the property and funds of the nation. The Cherokees have received from time to time rental for the Cherokee Strip, and have in council ordered it to be divided between Cherokees of the pure blood, excluding the freedmen and the Delawares from participation in it.

"The object of the bill, so far as that is concerned, is to authorize these bands, the Delawares by their chiefs and the freedmen by a guardian to be appointed with the approval of the Secretary of the Interior, to bring suit in the Court of Claims to assert their rights in law and in equity to these funds." (Cong. Rec., vol. 21, pt. 10, p. 10359.)

The bill came up on September 24, 1890, for final passage, and during the debate Senator Reagan of Texas said:

"I ask the Senator from Massachusetts if the committee ascertained the amount of money that it is proposed shall be partitioned by this bill, the amount of money that the Shawnees and Delawares will receive?

"Mr. DAWES. The amount the freedmen would be entitled to?

"Mr. REAGAN. I do not mean what they are entitled to, but the amount of the funds to be so partitioned.

"Mr DAWES. In round numbers I suppose there are a million dollars which have been distributed by the Cherokee Nation among the pure bloods, which it is claimed by the freedmen and Delawares they should have had a proportionate part of. If the Court of Claims should agree with former Congresses and with the committee, the Cherokee Nation would have to make good to the freedmen and the Delawares a sum equal to their proportionate part of the fund reaching somewhere in the neighborhood of a million dollars. It is made up in this way: The United States appropriated $300,000 upon payments towards the Cherokee Strip some five years ago. The Cherokees asked for an advance, as it was called, and the Government of the United States appropriated $300,000 on account of the Cherokee Strip. They took that sum of money and, instead of distributing it among all their people, distributed it to a class. Congress came in and passed a law requiring that out of their trust fund a sum sufficient should be taken to equalize that. In the meantime they received $300,000 a year rental from cattlemen on the Cherokee

Strip. I do not know how many times $300,000 have been repeated annual payments. Those stand precisely like the other. I think there is fully a million of dollars which they have distributed per capita to a class that the other classes claim they have been unjustly deprived of."

In reply to inquiries from Senator Reagan as to why it was necessary to pass an act authorizing suits in the Court of Claims, and where the fees of the attorneys who brought the suits would come from, Mr. Platt, said:

"As I understand the matter, those Delawares and Shawnee Indians and freedmen have no right now to go into the Court of Claims; and in the second place, with regard to this amount which is reserved to be paid to an attorney, if the attorney for either the Delawares or the Shawnees or the freedmen recovers any sum in the Court of Claims, the Court of Claims may make an allowance for the attorneys' fees not exceeding 10 per cent.

"Mr. HARRIS. Does that allowance come out of the amount recovered?

"Mr. PLATT. It comes out of the amount recovered, and the United States is not likely to suffer in this litigation beyond $10,000 anyway, and from what I have known of the affairs down there it has seemed to me that the Delawares and freedmen had at least a fair claim to some portion of this money which the Cherokees have received and divided among the pure bloods only, and the only way in which they can get it, as I understand, is for this act to be passed enabling them to go into the Court of Claims and to there prosecute a suit for it."

Mr. Cockrell moved to strike out section 4 of the bill, providing for suit of Shawnees against the United States to recover for sum of money embezzled by an official of the Government, and it was stated that if there was objection the bill would go over.

"Mr. DAWES. Here is a large body of freedmen who have been kept out of a large sum of money because there is no place for them to go to assert their claim."

The amendment was thereupon rejected, and the bill was passed.

On September 29, 1890, the bill came up for final passage in the House of Representatives (Cong. Rec., vol. 21, pt. 11, p. 10693). An inquiry having been made as to the nature of the bill, it was explained by the chairman of the Committee on Indian Affairs of the House.

"Mr. PEEL. Mr. Speaker, the facts are about these: Under the treaty of 1866 the freedmen, former slaves of the Cherokees, were made citizens of the United States, with all the rights and privileges of the citizens of the Cherokees. Under that treaty the Shawnees and Delawares, by contract, purchased an interest in the Cherokee Nation, and they became citizens with certain privileges and rights.

"Under the disbursements of certain funds arising from the sale of lands west of the ninety-sixth degree, the question has become an uncertain one as to whether or not they are entitled to participate in the fund. The object of the bill, so far as they are concerned, is to authorize them to bring suit to test their rights, and the Cherokees want it just as much as they do. Their delegates have been before our committee and recommended this bill. Their delegates are here now (Colonel Adair being with them), and the desire of both sides is to allow these three different bunches to bring suit to fix their legal status so as to regulate the matter in the future."

Proposed instructions to commission appointed under decree of February 3, 1896, by the Secretary of the Interior, submitted by counsel to the court and order of court thereon.

(Received in report from Interior Department Nov. 21, 1907.)

The court doth adjudge and decree that the commission provided for in its decree entered of record in the Court of Claims on February 3, 1896, in the case of *Moses Whitmire, trustee, etc.*, v. *Cherokee Nation et al.*, being case No. 17209, shall be governed by the following rules and directions in the discharge of the duties prescribed for it in said decree, to wit:

First. Said commission before commencing its duties shall qualify by each member thereof taking an oath before any United States commissioner that he will faithfully perform the duties of his said office.

Second. It shall have the same power to administer oaths to witnesses, to compel the attendance of the same, to compel the production of written testimony, and to determine the admissibility of all evidence offered as the Court of Claims would have in making the investigation prescribed for said commission.

Third. It shall, as soon as practicable, proceed to the Cherokee Nation to hear such evidence as may be offered pro and con as to the identity of the freedmen entitled to share in the money mentioned in the decree; but before beginning its labors it shall give notice there by at least two weekly insertions in the two most widely circulated papers in the nation as to the times and places they will hear evidence on behalf of the parties to this suit. And it shall, as far as practicable, appoint such places for the hearing of such testimony as shall be most convenient to the parties to this suit; and it shall also hear testimony at any place other than the Cherokee Nation that in its judgment may be necessary.

Fourth. It shall make no other inquiry as to the authenticated Cherokee roll mentioned in the decree than to ascertain who of the persons mentioned on said roll and their descendants were alive on May 3, 1894, and who were at said date citizens of the Cherokee Nation.

Fifth. In making the investigation prescribed in said decree it shall confine itself to the identity of the following classes of persons only: (1) All persons who had been held in bondage by any member of the Cherokee Nation and who had been liberated by act of law or by voluntary act of their owners and the descendants of such; (2) all free colored persons who were in the Indian Territory at the commencement of the rebellion and were residents thereof at the time of the treaty of July 9, 1866, or who returned thereto within six months after the conclusion and ratification of said treaty, and their descendants; (3) all of the aforesaid classes who were citizens of the Cherokee Nation on May 3, 1894.

Sixth. The commission is hereby authorized to employ a competent clerk.

Seventh. In determining the identity of the persons aforesaid a vote of a majority of said commission shall establish the identity of the person provided for in said decree, and when the commission shall have finished its labors it shall report to the Secretary of the Interior the names of the persons determined by it as being entitled to share

in the proceeds mentioned in the aforesaid decree, with evidence as to identity of freedmen where commission is not unanimous.

Eighth. The said commission shall conclude its labors within four months from the time it qualifies as aforesaid.

(Indorsement:) Respectfully referred to the Secretary of the Interior. The instructions to be given to the commissioners must be determined by him. The within, proposed by counsel, seem unobjectionable to the court, except the second. But with the approval of the Secretary the court will appoint the commissioners selected by him commissioners of this court to take testimony, which will authorize them to administer oaths.

WILLIAM A. RICHARDSON.

FEBRUARY 15, 1896.

The court's construction of Article IX of the treaty of July 19, 1866, as to the date before which absent freedmen should return to the Cherokee Nation.

Moses Whitmire, trustee, *v.* The Cherokee Nation.

FEBRUARY 18, 1896.

Hon. DANIEL M. BROWNING,
Commissioner of Indian Affairs.

SIR: The court is informed that the Commissioner of Indian Affairs desires its opinion in regard to the fifth of the proposed instructions referred for the consideration of the Secretary of the Interior February 15, 1896.

The decree in this case follows and refers to Article IX of the treaty with the Cherokee Nation, July 19, 1866, and the persons therein designated are the complainants in this case entitled to payment under the decree.

The court is of the opinion that the clauses in that article in these words, "*and are now residents therein, or who may return within six months, and their descendants,*" were intended, for the protection of the Cherokee Nation, as a limitation upon the number of persons who might avail themselves of the provisions of the treaty; and consequently that they refer to both the freedmen and the free colored persons previously named in the article; that is to say, freedmen and the descendants of freedmen who did not return within six months are excluded from the benefits of the treaty and of the decree.

The court is also of the opinion that this period of six months extends from the date of the *promulgation of the treaty*, August 11, 1866, and consequently did not expire until February 11, 1867.

WILLIAM A. RICHARDSON,
Chief Justice.

(31 C. Cls., 147, 148.)

Instructions by the Secretary of the Interior to commission appointed by him under the decree of February 3, 1896.

(Report from Interior Department of November 21, 1907.)

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, February 20, 1896.

WILLIAM CLIFTON, ROBERT H. KERN, WILLIAM B. THOMPSON,
Commissioners.

GENTLEMEN: By the terms of a decree of the Court of Claims filed February 3, 1896, by the said court as the final decree in case 17209, entitled *Moses Whitmire, trustee for the Freedmen of the Cherokee Nation*, v. *The Cherokee Nation and the United States, for certain claims of the Shawnee and Delaware Indians and the Freedmen of the Cherokee Nation, etc.*, it was ordered and adjudged that for the purpose of ascertaining and determining who are the individual freedmen of the Cherokee Nation now entitled to share in the distribution of the sum of $903,365 awarded them, the Secretary of the Interior was authorized to appoint three commissioners—one on the nomination of the complainant and one on the nomination of the defendant, the Cherokee Nation—to proceed to the Cherokee country and hear the testimony both for and against the identity of all the freedmen, free colored persons, and their descendants, claiming to be entitled to share in the distribution of said $903,365 that may be offered by the respective parties to said suit.

Pursuant to the aforesaid decree and in compliance with the directions contained in letter of the honorable Secretary of the Interior under date of February, 1896, you are informed that you have been appointed the members of said commission to proceed to the Cherokee country and hear the testimony both for and against the identity of all freedmen, free colored persons, and their descendants, claiming to be entitled to share in the distribution aforesaid, that may be offered by the respective parties to said suit.

By the ninth article of the Cherokee treaty of July 19, 1866 (14 Stats., p. 801), the Cherokees agreed "that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees: * * *" and it appearing to the court that under the provisions of said article 9 the aforesaid freedmen and free colored persons were admitted into and became a part of the Cherokee Nation and entitled to equal rights and immunities and to participate in the Cherokee national funds and common property in the same manner and to the same extent as Cherokee citizens of Cherokee blood, it was adjudged and decreed that the complainants in said suit and those whom they represented, being the freedmen and free colored persons aforesaid and their descendants living in and being on the 3d day of May, 1894, are entitled to participate hereafter in the common property of the Cherokee Nation, it being understood that the freedmen and their descendants and free colored persons above referred to should include only such persons of said class as

had not forfeited or abjured their citizenship of said Cherokee Nation at the date of the entering of said decree.

The commission before entering upon its duties under their appointment must qualify by each member thereof taking an oath before any United States commissioner, or otherwise, that he will faithfully perform the duties of his said office.

The commission will be governed by the following rules and directions in the discharge of the duties prescribed for it in said decree:

That you may have the same power to administer oaths to witnesses, to compel the attendance of the same, to compel the production of written testimony, and to determine the admissibility of all evidence offered as the Court of Claims would have in making the investigation prescribed for said commission. You will also be appointed commissioners of the Court of Claims to take said testimony and to administer oaths.

You will, as soon as practicable, fix upon a day when the commission will meet in Washington to receive such verbal instructions as may be desired, to formulate blanks containing such items of evidence as may be decreed essential in arriving at all the facts necessary to be established to facilitate the establishment of the identity of the claimant entitled to participate in the said distribution, and to prepare a form of schedule that shall present such facts as may be held to be necessary to a ready and prompt understanding of each individual case, that will aid the Secretary of the Interior in reaching a conclusion as to his approval thereof and in identifying the persons enrolled thereon when disbursing said money, as provided by said decree, and in the preparation of forms, handbills, circulars, etc., to be sent out to claimants.

You will at once give due public notice by advertisement in two of the most widely circulated papers in the nation, by at least two weekly insertions, and by such other methods as you may deem most effectual in reaching said claimants, such as handbills or circulars, of the times and places where the commission will hear evidence on behalf of the parties to the suit either in the Cherokee Nation or any other place that in your judgment may be necessary, most convenient to said freedmen and free colored persons.

I would suggest that in ascertaining and determining what freedmen are entitled to a distributive share of said fund the following questions be submitted to each claimant, so far as the same may be applicable to that particular case, viz:

1. When and where were you born?
2. Who were your parents?
3. Were you a slave in February, 1863?
4. If you were, what was your owner's name, and was your owner a Cherokee Indian?
5. If not a slave, but the descendant of a slave, state who were your father and mother and the names of their respective owners, and whether such owner was a Cherokee Indian.
6. Did you reside in the Cherokee Nation at the time of the treaty (July 19, 1866)?
7. If not, where did you live and when did you return to the Cherokee Nation to reside?
8. Have you lived there continuously ever since?

9. If not, state when you left the nation, how often and how long you remained away each time, with the reasons each time for leaving and remaining away.

10. In cases of married women, give your maiden name; and if married more than once, each of your married names.

11. Where do you now reside—give post-office address?

12. How long have you lived there consecutively?

In ascertaining the identity of the freedmen and free colored persons entitled to share under this decree, you are directed by the decree to accept what is known as the authenticated Cherokee roll, purporting to have been taken by the Cherokee Nation in 1880, and make no inquiry respecting it other than to ascertain who of said persons named on said roll were alive and what descendants of said persons were alive on May 3, 1894, and no evidence must be accepted by you tending to disprove the citizenship of any of the persons whose names appear on said roll. The "authenticated Cherokee roll" referred to in the decree is alleged to be on file in the office of the Secretary of the Interior, but no such roll is on file in that office, and the only copy known to be on file that could be taken for said "authenticated Cherokee roll" is a certified copy of said roll furnished to J. W. Wallace by the Cherokee authorities when he was in the Cherokee Nation in 1889 making up his census roll of Cherokee freedmen living and in being March 3, 1883.

This roll, a copy of which is herewith furnished you, contains the names of only 1,874 persons, while the decree of the court in this case, decided March 18, 1895, fixes the number, in 1880, of Cherokee freedmen at 2,052.

In making the investigation prescribed in said decree you will confine yourselves to the identity of the following classes of persons only:

1. All persons who had been liberated by the voluntary act of their former owners or by law, who were residents in the Cherokee Nation at the time of the treaty of July 19, 1866, or who returned within six months from the date of the promulgation of the treaty, viz, February 11, 1867, and their descendants; that is to say, freedmen and the descendants of freedmen who did not return within six months are excluded from the benefits of the treaty and of the decree.

2. All free colored persons who were in the Cherokee Nation at the commencement of the rebellion, and were residents in the Cherokee Nation at the time of the treaty of July 19, 1866, or who returned within six months from the date of the promulgation of the treaty, viz, February 11, 1867.

It must be further shown that all the persons identified as of either of said classes were alive and in being May 3, 1894, and were at that time residents of the Cherokee Nation, it being understood that the freedmen and their descendants and free colored persons above referred to include only such persons of said classes as have not forfeited or abjured their citizenship of said Cherokee Nation at the date of the entering of said decree (Feb. 3, 1896).

In determining the identity of the persons aforesaid a vote of a majority of the commission shall be sufficient to entitle the person to be enrolled on schedule as a beneficiary of the aforesaid fund.

You are hereby authorized to employ a competent clerk, who shall be a stenographer, at a monthly salary of $———, and such other

temporary clerical force as you may find necessary to facilitate and hasten your work. You are also authorized to rent an office in which to transact your business, to employ a competent person from time to time at a weekly salary of $———, to keep order during the time the commission is in session and taking testimony, and to attend to such other duties as may be found necessary by the commission in the prosecution of the work. The above salaries to be fixed by the commission.

It is expected that you will conclude your labors within four months from the time you qualify as aforesaid, but if before the expiration of that time you ascertain that a longer period is demanded and required to do justice to all alleged claimants you will so report the fact in ample time to the Secretary of the Interior, designating the additional length of time required in your estimation to complete the work, in order that the time may be extended if approved by him.

You will, on the completion of your labors, submit a schedule of the names of the persons determined by you as being entitled to share in the distribution of the fund of $903,365 mentioned in the aforesaid decree, with a typewritten report of your daily proceedings and of all evidence where claimant is not admitted at all or only admitted by a vote of the majority of said commission, and file stenographic notes of all testimony taken.

These instructions, with any other duties required of you by the aforesaid decree, a copy of which is herewith furnished you, you are expected to carry out fully, faithfully, and impartially, that justice may be meted out as contemplated by the Court of Claims.

Your attention is called to the following paragraph in the decree limiting the amount of expenditures to $6,500:

"And it is further directed that the amount of $6,500, or so much thereof as may be necessary, is hereby allowed for the compensation of the said commissioners and the necessary costs and expenses incidental to the ascertainment of the individual complainants by them as hereinbefore provided."

By direction of the Secretary of the Interior, your compensation will be $1,500 each for the whole work and actual and necessary traveling expenses.

Under no circumstances will you be allowed to expend more than said sum of $6,500 for your compensation and for necessary costs and expenses incidental to the ascertainment of the number of persons, etc., referred to in said decree.

Very respectfully,

D. M. Browning,
Commissioner.

Approved:
Hoke Smith, *Secretary.*

Department of the Interior,
Washington, April 21, 1896.

Commissioner of Indian Affairs.

Sir: I have approved and returned herewith the draft of instructions prepared by your office and submitted with your letter of February 20, 1896, for the guidance of the commission provided in the decree of the Court of Claims in cause No. 17209 of Moses Whitmire,

trustee for the freedmen of the Cherokee Nation, *against* The Cherokee Nation and the United States to ascertain and determine who are the individual freedmen and free colored persons of the Cherokee Nation now entitled to share in the distribution of the sum awarded by said decree of the Court of Claims, filed February 3, 1896.

The papers accompanying your communication are herewith returned.

Very respectfully,

HOKE SMITH,
Secretary.

(1236 Ind. Div., 1896. Three inclosures.)

Instructions proposed by attorney for Cherokee Freedmen and submitted to the court (filed April 14, 1896), and order of court thereon.

To the honorable Court of Claims:

The undersigned respectfully represents that he has spent the last few weeks in the Cherokee Nation with a view of having the case of the freedmen prepared for presentation to the commission. That he finds in many instances the former slaves of the Cherokee Nation during the rebellion were taken from that country by their owners, the Cherokees, to the far Southern States and in some instances to old Mexico. That at the conclusion of the war some of these slaves who had enlisted in the Union Army were disbanded at various points of the Union far away from the Cherokee country. That both of these classes of freedmen were left at these various points penniless and ignorant, but with no intention of abandoning their residence in the Cherokee country. That as soon as possible they returned to the Cherokee country, but some of them not within the six months' limitation specified in the treaty. That these people have resided there continuously since and been as good citizens as that country has. That Secretary Noble, when the Wallace roll was taken, instructed Wallace to enumerate this class of people, and this was done. That in the judgment of the undersigned the number of such people is only a few hundred and that it is the belief of the Interior Department, as well as of the undersigned, that to exclude people of this class would be contrary to the spirit of the treaty and would be a bone of contention in the Cherokee Nation. That justice to all parties would be best subserved by leaving it in the discretion of the commissioners in taking testimony under the decree of this court to allow such persons to be enrolled.

The undersigned has been summoned here by the Secretary for a conference in reference to the instructions to guide the commissioners. And that whilst he has seen the letter of Judge Nott in reference to this construction, but he feels that this was perhaps given by the court without its being aware of the fact above stated. He feels his duty to his clients demands that he should ask the court for its advice as to an instruction of this character, and he submits herewith the form of an instruction which he thinks the Secretary would cheerfully give if approved by the court. (Paper marked "Exhibit A.")

The undersigned further states that he found in the Cherokee country a large number of lawyers proposing to represent the freedmen before

this commission and making extravagant contracts with them. That he thereupon assumed to notify the freedmen that the decree in the case contain the following provision, "that each of said parties shall be entitled to be represented before said commissioners, either at the taking of testimony in the Cherokee country or elsewhere." That he had that provision inserted in the decree so as to enable the trustee to employ counsel to represent the freedmen before the commission. That thereupon he agreed with the freedmen to present the construction of this provision to the court and to the Secretary, that he felt satisfied that they would decide that it was the duty of the trustee to employ an attorney to take full charge of the freedmen's case before the commission. That in his judgment this should be done, but that the trustee will not do so unless he is advised that he can pay such attorney a reasonable compensation for his services out of the funds in this case. That the Cherokees have employed two of the ablest lawyers in the nation to represent them, and he would respectfully ask the advice of the court in this matter so the same may be suggested to the Secretary of the Interior. All of which is respectfully submitted.

ROBERT H. KERN.

EXHIBIT A.

In making the investigations prescribed in said decree, it shall confine itself to the identity of the following classes or persons only:

1. All persons who had been held in bondage by any member of the Cherokee Nation, and who had been liberated by act of law or by voluntary act of their owners, and the descendants of such, as provided in the terms of the treaty of July 16, 1866, and if it shall appear to said commission that any person or persons of the aforesaid class had been taken from the Cherokee Nation during the rebellion either by the owners thereof, or was absent therefrom during said time because of his or their belonging to either of the armies that were engaged in the late rebellion, and were unable to return to the Cherokee Nation within six months after the conclusion and ratification of the treaty referred to in the decree in said cause, of date July 16, 1866, because of circumstances beyond their control, but returned as soon as practicable, then no such person shall be excluded by said commission from the roll to be prepared by it, but the same shall be placed thereon, as well as the descendants of such.

2. All free colored persons who were in the Indian Territory at the commencement of the rebellion and were residents thereof at the time of the treaty of July 16, 1866, or who returned thereto within six months after the conclusion and ratification of said treaty.

3. All of the aforesaid classes who were residents of the Cherokee Nation on May 3, 1894.

ORDER.

The court is of the opinion that the act 2d March, 1895 (28 Stat. L., p. 910, sec. 11), prescribes the manner in which payments per capita shall be made and that the matter of payment is exclusively within the jurisdiction of the Secretary of the Interior.

The court, after further consideration, adheres to the opinion communicated to the Commissioner of Indian Affairs, February 18, 1896. The within motion for instructions is overruled. April 15, 1896.

By the court:

WM. A. RICHARDSON,
Chief Justice.

The numbers of names on Cherokee roll of 1880 omitted from Kern-Clifton roll.

DEPARTMENT OF THE INTERIOR,
Washington, October 2, 1909.

The ATTORNEY GENERAL.

SIR: Referring to the letter (G. M. A.) of September 30, 1909, from Assistant Attorney General John Q. Thompson, in regard to the enrollment of Cherokee freedmen, you are advised that the records of the Department of the Interior show that upon the final roll of Cherokee freedmen prepared by the commission or the Commissioner to the Five Civilized Tribes and approved by the department under the acts of Congress of June 28, 1898 (30 Stat. L., 495), and July 1, 1902 (32 Stat. L., 716), there are enrolled 174 freedmen whose names are also on the Cherokee roll of 1880, but who are not identified on the Kern-Clifton roll.

Very respectfully,

FRANK PIERCE,
First Assistant Secretary.

Repudiation of Kern-Clifton roll by Congress.

H. R. 8581.

The Curtis bill, approved June 28, 1898 (30 Stat., 495), was introduced in the House of Representatives on February 24, 1898, referred to the Committee on Indian Affairs, reported back March 1, 1898, and passed the House April 14, 1898, contained the following provision in section 22 of the bill, which afterwards became section 21:

"It shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims entered February 3, 1896."

The bill went to the Senate and on April 16, 1898, was referred to the Senate Committee on Indian Affairs and reported back with amendments, and among them one to confirm the Kern-Clifton Cherokee freedmen roll.

The bill was called up for discussion in the Senate June 7, 1898, when the following discussion, resulting in the defeat of the amendment, was had:

THE INDIAN TERRITORY.

"The VICE PRESIDENT. The morning business appears to be closed

"Mr. PETTIGREW. I ask to have House bill 8581 proceeded with.

"Mr. QUAY. I wish to submit a conference report on the Post Office appropriation bill.

"Mr. PETTIGREW. The Senate gave unanimous consent yesterday that this bill should be the order of business immediately after the

close of the routine business this morning, and such being the case, I feel that it is my duty to ask the Senate to continue with the bill in accordance with that unanimous agreement.

"Mr. QUAY. I suppose if unanimous consent has been given I can not prevent the taking up of the bill, but I have two objections to proceeding further with its consideration after it is taken up. First, I desire to present the report of the committee of conference on the Post Office appropriation bill, and second, I desire to look into this Indian bill. It will not require more than an hour's examination to satisfy me as to its provisions. My attention was first called to it when I was visited by a delegation of Cherokee Indians last night, and I am really not certain what ought to be done. I am certain, however, of two propositions—one that the amendment providing for the roll of Cherokee freedmen ought to go out, and that, I understand, will go out.

"Mr. PETTIGREW. I shall move to strike out that provision.

"Mr. JONES of Arkansas. It is impossible to hear on this side of the Chamber. I am very much interested in hearing what is going on upon the other side.

"The VICE PRESIDENT. The Senate will be in order, so that the Senator from Pennsylvania may be heard.

"Mr. PETTIGREW. I should like to have the bill laid before the Senate, and then we will proceed to discuss it.

"Mr. QUAY. I have no objection.

"There being no objection, the Senate, as in Committee of the Whole, resumed the consideration of the bill (H. R. 8581) for the protection of the people of the Indian Territory, and for other purposes.

"Mr. QUAY. Then the provision for segregating 157,000 acres of land by the Delaware Indians should go out. I am not so clear about that as I am that the freedmen's roll amendment should be defeated. The Indians themselves allege that the entire bill should be defeated; that it was passed by the House over their heads and against their will and in contravention of treaties made with them. But the bill has been carefully prepared and the subject has been thoroughly examined by the Committee on Indian Affairs, who are undoubtedly impartial.

"If the bill is constitutional, it may probably be better for the Indians that something of the sort should be enacted. As I have said, one of these amendments I will resist. I understand it is to be withdrawn. The other in regard to the Delaware Indians, I think, ought to go out. I should be glad if the Senator from South Dakota would allow an hour or two for the further examination of the bill.

"Mr. PETTIGREW. I will say to the Senator from Pennsylvania that the committee investigated both those questions and came to the conclusion that both of them should go out of the bill.

"Mr. QUAY. But they are put in the bill by the committee. They are Senate amendments.

"Mr. PETTIGREW. No; the Delaware provision is a House provision and the other was placed in the bill because we could reach it in conference if, after investigating it, we concluded it ought not to remain. That provision we now propose to strike out.

"Mr. QUAY. I do not know that I shall resist the passage of the bill with these two provisions eliminated.

"Mr. PETTIGREW. I think it will take us some time to dispose of the bill, and I should like to proceed with it.

"Mr. QUAY. I think eliminating those two points there will not be much opposition to it, though I am not authorized or prepared to say so. I should like to examine the Delaware amendment before the bill passes.

"Mr. PETTIGREW. We will reach it in conference.

"Mr. QUAY. I shall have no control over the conference; I shall have no voice there.

"Mr. HALE. Let those items be passed over.

"Mr. PETTIGREW. We will pass over those items.

"Mr. QUAY. (to Mr. Pettigrew). Do you wish me to suspend presenting the Post Office conference report?

"Mr. PETTIGREW. I should like to go on for a short time with the bill and see what progress we can make. I think it will take but a short time.

"Mr. QUAY. The understanding is distinct in any event that these two points are conceded by the committee?

"Mr. PETTIGREW. Yes, sir.

"Mr. BATE. I could not understand what the motion of the Senator from Pennsylvania was.

"Mr. PETTIGREW. No motion was made.

"Mr. BATE. He made some suggestions, but I could not understand their full import.

"Mr. PETTIGREW. I will state to the Senator from Tennessee that the Senator from Pennsylvania thought the two provisions should go out of the bill. One is in regard to the roll of freedmen in the Cherokee country. The committee are of the same opinion.

"Mr. BATE. Well.

"Mr. PETTIGREW. The other was the provision segregating 157,000 acres of land in the Cherokee country for the Delawares, which the Senator from Pennsylvania thinks should go out of the bill, and the committee concede that also.

"Mr. BATE. That is on pages 28 and 29. Is that the provision?

"Mr. PETTIGREW. I do not remember just on what pages of the bill. When we reach them, I shall move to strike them out.

"Mr. BATE. Mr. President, I think the bill is wrong in many respects, but I do not want to throw any obstacle especially in the way of taking action upon it. I think it is in violation of all the treaties that have ever been made with the Indians by this Government, and it is overriding moral and legal obligations. I think the whole thing is wrong. I have the treaties here, which I can read if necessary, but they have heretofore been read and the case is understood to be as I state it.

"That is my main objection to this bill. But the particular points that have just been made in reference to two provisions, one in regard to the freedmen and the other in regard to the Delaware Indians, ought, I think, to go out. I was hoping that the bill would go over until it could be thoroughly understood by the Senate. It is a very important measure, involving our moral obligations to those Indians, as well as our legal rights and the rights of the Indians and citizens in that Territory.

* * * * * * *

"The next amendment was on page 23, beginning with line 1, to insert:

"'The roll of the freedmen of the Cherokee Nation made under the provisions of the decree entered of record in the Court of Claims of the United States February 6, 1896, in the case of Moses Whitmire, trustee of the freedmen of the Cherokee Nation, against the Cherokee Nation and the United States, is hereby confirmed, and the commission of the Five Civilized Tribes shall make a roll of said freedmen by adopting the aforesaid roll as made in the aforesaid case. And it shall add thereto the names of the descendants of all persons thereon born since May 3, 1894, and the names of all persons who applied before the commission that made the roll of freedmen in said case, and whose names were not placed upon either said roll or the rejected roll of freedmen made by said commission of the Five Civilized Tribes justifies their being made citizens of the Cherokee Nation in accordance with the provision of the said decree, and the descendants of said persons born since May 3, 1894; and from the roll thus made the said commission shall expunge the names of all persons on said roll who have died since May 3, 1894, or who shall have abjuedr their citizeship in the Cherokee Nation; and the roll as thus made shall be the final and complete roll of the freedmen of the Cherokee Nation.'

"Mr. PETTIGREW. That is the amendment in regard to the Cherokee freedmen which I ask to have disagreed to."

The amendment was rejected.

Instructions to the Commissioners to the Five Civilized Tribes to make the roll under the act of June 28, 1898, without considering the Kern-Clifton roll.

DEPARTMENT OF THE INTERIOR,
Washington, April 29, 1911.

The ATTORNEY GENERAL.

SIR: Referring to the informal request of Mr. Anderson, of your department, I am transmitting herewith a copy of a letter, dated May 11, 1900, from E. A. Hitchcock, Secretary of the Interior, addressed to the acting chairman of the Commission to the Five Civilized Tribes, containing instructions for the making of a roll of Cherokee freedmen, as required by the act of June 28, 1898 (30 Stat., 495). Said letter was approved by Judge Van Deventer, who was then Assistant Attorney General for the Interior Department, as appears from his initials written thereon.

Very respectfully,

CARMI A. THOMPSON,
Assistant Secretary.

W. V. D.

W. C. P.

DEPARTMENT OF THE INTERIOR,
Washington, May 11, 1900.

ACTING CHAIRMAN OF THE COMMISSION
TO THE FIVE CIVILIZED TRIBES.

SIR: The act of Congress approved June 28, 1898 (30 Stat., 495), in prescribing the duties of your commission in the matter of making rolls of citizenship of the several tribes, among other things, said:

"It shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six."

This direction is plain and explicit. The decree referred to was rendered in the case of *Whitmire, Trustee*, v. *Cherokee Nation et al.* Some question has arisen as to what constitutes a strict compliance with the terms of that decree.

The Cherokee national council, by acts of April 26, 1886, November 25, 1890, and May 3, 1894, had restricted the distribution of funds derived from the public domain of the nation and from sales of lands to the United States to citizens of the nation by blood, excluding the freedmen from any share therein, and the Court of Claims was authorized to determine as to the right of the freedmen to share in the distribution of such funds. The court rendered a decree in 1895 (30 C. Cls., 180), finding that the freedmen were entitled to participate in the Cherokee national funds and common property in the same manner and to the same extent as Cherokee citizens of Cherokee blood. It was further decreed that the roll of such freedmen, known as the "Wallace roll," should be taken as showing the true number of such freedmen, and the Secretary of the Interior was directed as follows:

"To cause the Wallace roll aforesaid to be further corrected by adding thereto descendants born since March 3, 1883, and prior to May 3, 1894, striking therefrom the names of those who have died or have ceased to be citizens of the Cherokee Nation between the aforesaid dates, so that when thus amended and changed it shall represent the number of freedmen, free colored persons, and their descendants, aforesaid entitled to participation in the distribution of the fund now awarded to the complainant."

This decree was not satisfactory to either party, the adoption of the Wallace roll being especially objected to by the Cherokee Nation. In order, however, to avoid an appeal and further litigation, the parties agreed to certain modifications, and the court approving that course the decree of February 3, 1896, was entered as the final decree in the case.

The finding of the court as to the rights of the complainants is as follows:

"And it appearing to the court that under the provisions of article 9 of the treaty of July 19, 1866, made by and between the Cherokee Nation and the United States, the said freedmen, who had been liberated by voluntary act of their former owners or by law, and all free colored persons who resided in the Cherokee country at the commencement of the Rebellion and were residents therein at the date of said treaty, or who had returned thereto within six months of said last-mentioned date, and their descendants, were admitted into and became a part of the Cherokee Nation and entitled to equal rights and immunities and to participate in the Cherokee national funds and common property in the same manner and to the same extent as Cherokee citizens of Cherokee blood."

Upon this and the other findings the acts of the Cherokee national council excluding the "aforesaid freedmen and free colored persons and their descendants" from participation in the distribution of the national funds were declared void and the Cherokee Nation and the United States, as trustee of the Cherokee Nation, were enjoined and prohibited in thereafter making distributions of the proceeds of the public domain or common property of the nation "from making any discrimination between the Cherokee citizens of Cherokee blood or parentage and Cherokee citizens who are or were freedmen who had been liberated by voluntary act of their former owners or by law, as

well as all free colored persons who were in the Cherokee country at the commencement of the Rebellion and were residents therein at the date of said treaty or who returned thereto within six months thereafter, and their descendants, to the prejudice of the latter."

It was declared that "the freedmen and their descendants and free colored persons" should include only such persons of said classes as had not forfeited or abjured their citizenship of said Cherokee Nation at the date of said decree.

The most important part of said decree for the purpose of the present inquiry is found in a paragraph prescribing the method of ascertaining and determining who are the individual freedmen of the Cherokee Nation, which paragraph is as follows:

"And it is further ordered and adjudged that, for the purpose of ascertaining and determining who are the individual freedmen of the Cherokee Nation now entitled to share in the distribution of the said sum of $903,365, the Secretary of the Interior be authorized to appoint three commissioners, one on the nomination of the complainant and one on the nomination of the defendant, the Cherokee Nation, but both nominations to be approved by him, to proceed to the Cherokee country and hear the testimony both for and against the identity of all freedmen, free colored persons, and their descendants, claiming to be entitled to share in the distribution of said $903,365 that may be offered by the respective parties to this suit; and that each of said parties shall be entitled to be represented before said commissioners, either at the taking of testimony in the Cherokee country or elsewhere; and that the said commissioners, in ascertaining the identity of the freedmen entitled to share under this decree, shall accept what is known as the authenticated Cherokee roll, the same now being on file in the office of the Secretary of the Interior, having been furnished to him and purporting to have been taken by the Cherokee Nation in 1880 for the purpose of showing the number of freedmen then entitled to citizenship in the said nation under the terms of the treaty between the United States and the Cherokee Nation hereinbefore referred to, and their descendants; and the said commissioners shall ascertain who of said persons named on said roll were alive and what descendants of said persons were alive on May 3, 1894, and no evidence shall be accepted by said commission tending to disprove the citizenship of any of the persons whose names appear upon said roll."

A roll was made under this decree, known as the "Clifton roll," which was approved by this department in 1897. It has been claimed that said roll contains many names not properly belonging there, but whether this fact influenced Congress to disregard that roll and direct that a new one be made in strict compliance with said decree is immaterial, for the fact remains that the decree alone is to be taken as a guide for making the roll which your commission is to prepare.

The roll of 1880, made by the Cherokee Nation, is to be accepted by you as conclusive of the right of all persons whose names are found thereon and of their descendants to be enrolled by you. Your only duty in relation thereto is to ascertain who of the persons named therein are alive and who of their descendants are alive, and place their names on your roll, omitting, however, all who have forfeited or abjured their citizenship.

In the former decree the Wallace roll, after being corrected by adding the names of descendants, and striking off the names of those

who had died or ceased to be citizens, was to be taken as the correct roll of all freedmen, free colored persons and their descendants, entitled to citizenship. The same explicit direction was not given in the modified decree as to the roll of 1880. By the former decree the Secretary of the Interior was authorized to appoint a commissioner to ascertain and report the facts necessary for the correction of the Wallace roll, but in the modified decree he was, for the purpose of ascertaining and determining who are the individual freedmen, authorized to appoint three commissioners "to proceed to the Cherokee country and hear testimony both for and against the identity of all freedmen, free colored persons and their descendants, claiming to be entitled to share in the distribution of said $903,365." This commission was not restricted to ascertaining the facts necessary to complete and bring up to date the roll of 1880, but, in addition to that duty, were also to bear testimony, both for and against, the identity of *all freedmen, free colored persons and their descendants*, claiming citizenship in the Cherokee Nation, but no evidence was to be accepted tending to disprove the citizenship of any person whose name appears upon the roll of 1880. Evidently something more than the completion and correcting of the roll of 1880 was intended. It was intended that a full and complete roll should be made that should include the names of all freedmen, free colored persons and their descendants, entitled to be recognized as citizens of the Cherokee Nation. It is your duty now to make such a roll, which shall include the names of all Cherokee citizens "who are or were freedmen who had been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the Cherokee country at the commencement of the rebellion and were residents therein at the date of said treaty, or who returned thereto within six months thereafter, and their descendants."

The instructions of November 23, 1899, upon this subject are hereby revoked.

Very respectfully, E. A. HITCHCOCK,
Secretary.

Ind. Ter. Div. 2729–1899. 3226–1899.

Opinion of Assistant Attorney General in case of Charles Foreman.

DEPARTMENT OF THE INTERIOR,
Washington, April 16, 1904.

The SECRETARY OF THE INTERIOR.

SIR: I received, by reference of March 25, 1904, with request for opinion thereon, the application of Charles Foreman to be enrolled as a freedman citizen of the Cherokee Nation, with motion for review of departmental decision of December 19, 1903, thereon.

The motion states that Foreman, by his own testimony, did not return to the territory until shortly after the return of the party carrying back the remains of Chief John Ross, deceased, which other evidence clearly fixes was not until some time in May, 1867. This was not until after February 11, 1867, when the six months' period limited by Article IX of the treaty of July 16, 1866 (14 Stat., 799, 801), promulgated August 11, 1866, had expired, and it is therefore

insisted that Foreman was barred by the treaty limitation and that his admission was erroneous.

The facts in Foreman's case are that he being perhaps claimed to be in a state of servitude was brought to Washington by Chief John Ross as one of his party, or retinue. Chief Ross came officially as a delegate from the Cherokee Nation to the Government of the United States and Foreman was one of the delegate's retinue to the time of Ross's death, which was about August 1, 1866, and after the negotiation of the treaty, as its preamble shows he was then living, though "too unwell to join in these negotiations." Why Foreman did not return with the funeral party, or when or why he became separated from the delegate party does not appear in the record, but in the view I take of the matter this is immaterial.

While Foreman was one of Ross's retinue upon a diplomatic mission from the Cherokee Nation to the Government of the United States, he and all others of Ross's party, equally with the delegate, were in view of the law residents of the State from which the delegate was accredited. It follows that from the date of the treaty to the severing of his employment by the delegate, Foreman was, in view of the law and a proper construction of the treaty, a resident of the territory. It is immaterial whether his going with the delegate was constrained, the obedience of a slave, or the voluntary act of a free person. His presence at the delegation was residence in the Cherokee Nation. This brings him within the terms of Article IX of the treaty fully qualified as one of those who "are now residents therein."

Why he did not continue with the delegation therefore becomes immaterial, as he being within the provision of Article IX of the treaty would only lose the citizenship conferred by such act of removal from the nation and settlement elsewhere as would be an expatriation. His speedy return soon after return of the funeral party clearly shows that he had not formed an intent to sever his citizenship in the nation and had not settled elsewhere with intent to remain. I am therefore of opinion that the motion should be denied and that the departmental decision in Foreman's case should be adhered to.

The decision in Foreman's case is made the basis of a communication, January 8, 1904, by the Commission to the Five Civilized Tribes, and an extended argument by counsel for the Cherokee Nation respecting the evils that are apprehended will arise unless Article IX of the treaty be strictly and literally construed to mean an actual physical presence in the territory on or prior to the period limited, expiring February 11, 1867. This alarm is wholly unjustified by the facts. There could have been no very numerous retinue of freedmen or free colored persons attached to the delegate party. The decision applies only to its own facts. I am wholly unable to see that just ground for such alarm exists. But were they many or few, I am clearly of the opinion that such freedmen and free colored persons as went from the nation as part of the delegate's party, or retinue, so long as they were connected with it must be regarded as within the meaning of the treaty as they were in view of the law, as during such time "residents" of the territory of the nation, entitled to all the rights of actual residents.

As to other freedmen and free colored persons, it is argued that slaves have no domicile. This may be admitted, but immediately

upon emancipation rights of domicile must instantly arise to the former slave. From proclamation of the thirteenth amendment to the Constitution of the United States, December 18, 1865, there were no slaves in the United States. It is true that all former slaves became legally freedmen and had some domicile. But for a longer time there were persons illegally restrained of their liberty, as there still are, as convictions before the courts now from time to time occurring for "peonage" conclusively show. As to such a person it can not be said that "his domicile would thenceforth be of his own choosing." One under actual restraint, whether legal or not, can not freely choose his own place of abode or his domicile. Presumably the domicile of one by law free and entitled to choose it is that place where he abides with no present intent to remove elsewhere. Such presumption, however, may be rebutted by proof and domicile shown to be elsewhere.

Very respectfully,

FRANK L. CAMPBELL,
Assistant Attorney General.

Approved, April 16, 1904.
E. A. HITCHCOCK, *Secretary.*

Opinion of Assistant Attorney General in case of Mary Ann Riley.

OFFICE OF THE ASSISTANT ATTORNEY GENERAL,
Washington, D. C., August 31, 1905.

The SECRETARY OF THE INTERIOR.

SIR: I received by reference of June 19, 1905, the record in the case of Mary Ann Riley and others, applicants for enrollment as Cherokee freedmen, with request for my opinion "whether the applicants in said case are entitled to enrollment."

The applicants are Mary Ann Riley, born about 1820; her daughter, Mary Hazelrig, née Riley, born about 1855, for herself and minor children, William A., Jesse, Lacy, Alexander, Joseph E., James M. T., James L., and Fred; Mary Brown, née Hazelrig, for herself and minor children, Robert Lee and George R. The Commission to the Five Civilized Tribes found that—

"Mary Ann Riley and Mary Hazelrig are mother and daughter, and were the slaves of a Cherokee citizen at the commencement of the rebellion; that they were taken out of the Cherokee Nation during said rebellion and did not return thereto and establish a residence therein within the time specified in the decree of the Court of Claims, rendered February 3, 1896, in the case of *Moses Whitmire, trustee, etc.* v. *The Cherokee Nation et al.*, for the return of Cherokee freedmen to said nation. The other applicants herein are children and grandchildren of the applicant, Mary Hazelrig, were born since 1866, and possess no rights to enrollment other than as descendants of the said Mary Hazelrig. None of the applicants herein can be identified on the Cherokee authenticated tribal roll of 1880, or the Cherokee census roll of 1896. * * * The applications * * * should be denied. * * * It is so ordered."

The applicant, Mrs. Riley, is identified on the Kerns-Clifton roll, and Mrs. Hazelrig on that roll and the Wallace roll of freedmen. The Indian Office recommend approval of the action of the commis-

sion. Counsel for applicants make no contention upon the facts as found by the commission. I therefore accept them as true for the purposes of this opinion.

Counsel, however, contend that by their enrollment upon the Kerns-Clifton roll—

"These people were judicially declared to be citizens of the Cherokee Nation and freedmen. They were judicially declared to be entitled to all the rights which they got under the treaty of 1866. It was the valid judgment of the court, saying that they had brought themselves under the provisions of that treaty, and were entitled to all rights and privileges of it, and therefore that the Cherokee Nation and the United States were forever enjoined from keeping them out of the provisions of such treaty. The only exception made was that the person who should make application to go on the roll should not have forfeited or objured his citizenship at the date of the entering of the decree. Not only was this roll made and entered under the decree of the court and approved by the Secretary of the Interior, but the Cherokee Nation was a participant in its making. Its representative was present, cross-examined witnesses, with the amplest opportunity presenting testimony, and contesting the rights of every person claiming to be entitled as a freedman to citizenship and rights of the Cherokee Nation. It is therefore estopped in contesting the right of the claimants to share in the lands and moneys of the Cherokee Nation.

"We do not believe, therefore, that Congress intended by the Cherokee treaty to go behind that roll, but even if it did, Congress could not disturb the judgment of that court."

The reference is to the adjudication in the case of *Whitmire, trustee* v. *The Cherokee Nation* (30 C. Cls., 138, 180–196). Jurisdiction was conferred upon that court by the act of October 1, 1890 (26 Stat., 636), among other things—

"to hear and determine what are the just rights in law or in equity of the * * * Cherokee freedmen who are settled and located in the Cherokee Nation under the provisions and stipulations of article 9 of the aforesaid treaty of 1866, in respect to the subject-matter herein provided for.

"SEC. 2. That the said * * * freedmen shall have a right * * * to begin and prosecute a suit or suits against the Cherokee Nation and the United States Government to recover from the Cherokee Nation all moneys due either in law or equity and unpaid to the said * * * freedmen, which the Cherokee Nation have before paid out or may hereafter pay, per capita, in the Cherokee Nation and which was or may be refused to or neglected to be paid to the said * * * freedmen by the Cherokee Nation out of any moneys or funds which have or may be paid into the treasury of or in any way have come or may come into the possession of the Cherokee Nation, Indian Territory, derived from the sale, leasing, or rent for grazing purposes on Cherokee lands west of 96° west longitude, and which have been or may be appropriated and directed to be paid out per capita by the acts passed by the Cherokee council, and for all moneys, lands, and rights which shall appear to be due to the said * * * freedmen under the provisions of the aforesaid articles of the treaty."

This was a jurisdiction to determine the rights in the common tribal property of the freedmen as a class, and neither in terms nor by necessary implication did it extend to determination of who particular persons composed and constituted such class or who were freedmen.

May 8, 1895 (30 C. Cls., 185), the court, after discussion, said: "The court therefore takes the Wallace roll as furnishing the true number for the freedmen, 3,524," but this was to be corrected (ib., 188) by the exclusion of the dead and of those who had ceased to be citizens and by adding descendants born after March 3, 1883, and prior to May 3, 1894, and "when thus amended and changed it shall represent the freedmen entitled to participate in the fund." In the decree (ib., 193) it was adjudged that the "freedmen and free colored persons aforesaid and their descendants are entitled to participate hereafter in the common property of the Cherokee Nation," etc. This decree was annulled and another by consent was entered (6th Ann. Rep. Commission to the Five Civilized Tribes, p. 70) with a paragraph in substantially the same terms, but the basis adopted was the Cherokee freedmen's roll of 1880, prepared by the tribal authorities. That roll was to be corrected by a commission appointed by the Secretary of the Interior, one member of which was nominated by the Cherokee Nation. The Kerns-Clifton roll was prepared by this commission. There was no provision for review by the court of the proceedings of this commission by appeal or exceptions. On the contrary, this commission was directed to report its roll, not to the court, but to the Secretary of the Interior, and when it was approved by him the fund in control of the court was to be paid to the persons borne on that roll.

The effect of an adjudication of right of citizenship to the persons borne on the Kerns-Clifton roll can be maintained only on the theory that the court delegated its judicial powers to the commission and the Secretary of the Interior. A mere statement of this proposition refutes the contention. That a court can not delegate its judicial power is a fundamental proposition needing no citation of authority. The right of persons on the Kerns-Clifton, not borne on the Cherokee 1880 freedmen, roll was never in any sense adjudicated. As to them, the Kerns-Clifton enrollment was an administrative proceeding or act simply. It, being a purely administrative proceeding, remained subject to revision and correction in any manner then or thereafter provided by law.

The court, in *Whitmire* v. *The Cherokee Nation*, supra, as part of its original and final decree, defined the class of persons whose rights were thereby established and who were to be enrolled by making reference to article 9 of the treaty of July 19, 1866—

"with respect to the rights of said freedmen who had been liberated by voluntary act of their former owners or by law, and all free colored persons who resided in the Cherokee country at the commencement of the rebellion and who on the said date resided therein, or who returned thereto within six months thereafter, and their descendants * * *. It being understood that the freedmen and their descendants and free colored persons above referred to shall include only such persons of said class as have not forfeited or abjured their citizenship of said Cherokee Nation at the date of the entering of the decree."

Except in punctuation, the definition of the class of persons was clearly intended to be a substantial quotation (in past tense) of that in article 9 of the treaty, so that the treaty provision itself was given to the commission as guide for its action, restricted by the added direction as to forfeiture and abjuration of Cherokee citizenship. Having this precept as a limitation on its powers, the enrollment of other persons not within the class so defined was in excess of the powers of the commission and never sanctioned by the court.

The difference of punctuation above noticed, and any construction founded on the punctuation of article 9 of the treaty, is in the present case immaterial. It is unnecessary to reenter into a discussion of the proper construction of this provision of article 9 of the treaty, heretofore fully considered in my opinion of March 22, 1904, and in that of May 9, 1905, in case of Burrell Daniels. If the six months' period was applicable to this class, the applicants, as the commission find, did not comply with it; if it was not applicable, they were merely made Cherokee citizens by the treaty, with "all the rights of native Cherokees," and became at once liable, without benefit of a six months' period, to operation of section 2 of article 1 of the Cherokee constitution, if they settled and became legally domiciled at Lawrence, Kans. If either state of facts be conceded to be true, it, in my opinion, follows that the Kern-Clifton commission exceeded its powers in assuming to grant their enrollment.

That enrollment having been, as above shown, an administrative act and not a judicial one, was subject to review and correction in any manner that Congress should by law direct. The act of June 28, 1898 (30 Stat., 495, 502), directed the Commission to the Five Civilized Tribes that—

"It shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six."

Congress confirmed some Indian tribal rolls. It might as easily have confirmed the Kerns-Clifton roll, and naturally would have done so had it regarded that roll as either an adjudication of right or even only an accurate roll. Instead of so doing, it directed compilation of a roll in strict compliance with the terms of the decree. This implies that Congress did not regard the Kerns-Clifton roll as made in compliance with that decree, else it would have confirmed that roll, as it did the tribal roll of 1880.

If the facts were conceded to be as stated in the findings, it would follow that the commission acted in strict compliance with the direction given by Congress in the act of 1898, supra. It is represented, however, that, in fact, Tom Riley returned to the nation in 1866, and some evidence in the record is to the effect that he left Kansas with the announced intention of returning to the nation as early as February, 1866, before the date of the treaty. Since reference of the case to me, a further paper is filed on behalf of the applicants in the nature of an application for rehearing, which, among other things, represents—

"that Tom Riley never established a home or owned any land elsewhere than the place of his early associations, to wit, in the Cherokee Nation, where he was a Cherokee slave * * *; that the testimony adduced at the original trial tending to show that Tom Riley resided in the State of Kansas during the years after he returned to

the Indian Territory in the fall of 1866 was procured by undue influence and improper inducements * * *; that the case was not properly presented to the Dawes Commission and was hurriedly prepared, without time for careful consideration and preparation, and also by reason of the dense ignorance of the applicants."

It is within the discretion of the Secretary, and entirely proper for him to grant such application.

Very respectfully,

FRANK L. CAMPBELL,
Assistant Attorney General.

Approved, August 31, 1905.

THOS. RYAN,
Acting Secretary.

Extracts from annual reports of the Commission to the Five Civilized Tribes for the years ending June 30, 1900, to June 30, 1905, inclusive, and extracts from the annual reports of the Commissioner to the Five Civilized Tribes to the Secretary of the Interior for the years ending June 30, 1906, and June 30, 1907, relating to the enrollment of Cherokee citizens.

(From Report of Commission to the Five Civilized Tribes ending June 30, 1900.)

The commission, early in the year 1900, determined upon and advertised appointments for the enrollment of Cherokees (Indians, Delawares, and freedmen) from May 14 to November 23, 1900, as follows:

Bennett, from Monday, May 14, to Friday, May 18, inclusive.
Illinois, from Monday, May 21, to Friday, May 25, inclusive.
Tahlequah, from Monday, May 28, to Friday, June 8, inclusive.
Rose, from Monday, June 11, to Friday, June 15, inclusive.
Spavinaw, from Monday, June 18, to Friday, June 22, inclusive.
Grove, from Monday, June 25, to Friday, June 29, inclusive.
Fairland, from Monday, July 9, to Friday, July 13, inclusive.
Westville, from Monday, July 16, to Friday, July 20, inclusive.
Stillwell, from Monday, July 23, to Friday, July 27, inclusive.
Bunch, from Monday, July 30, to Friday, August 3, inclusive.
Sallisaw, from Monday, August 6, to Friday, August 10, inclusive.
Muldrow, from Monday, August 13, to Friday, August 17, inclusive.
Fort Gibson, from Monday, August 20, to Friday, August 31, inclusive.
Prior Creek, from Monday, September 10, to Friday, September 14, inclusive.
Vinita, from Monday, September 17, to Friday, September 28, inclusive.
Welch, from Monday, October 1, to Friday, October 5, inclusive.
Bartlesville, from Monday, October 8, to Friday, October 12, inclusive.
Nowata, from Monday, October 15, to Friday, October 19, inclusive.
Oologah, from Monday, October 22, to Friday, October 26, inclusive.
Claremore, from Monday, October 29, to Friday, November 9, inclusive.
Catoosa, from Monday, November 12, to Friday, November 16, inclusive.

Chelsea, from Monday, November 19, to Friday, November 23, inclusive.

A combination of circumstances theretofore unseen arose to prevent the fulfillment of those engagements prior to July 9, and the commission found it necessary to cancel same, preparing, however, to enter fully upon this work on the last-named date. No progress in the matter of enrollment of Cherokees is therefore to be reported for the fiscal year ended June 30, 1900. (See Annual Reports of the Department of the Interior for 1900, p. 178.)

(From Report of Commission to the Five Civilized Tribes for year ending June 30, 1901, pp. 22 to 28, inclusive.)

CHEROKEES.

In January, 1900, the commission began to address itself to the problems of making a correct roll of the citizens of the Cherokee Nation, as required by section 21 of the Curtis law, approved June 28, 1898. As much of said section as relates to this duty is as follows:

"That in making rolls of citizenship of the several tribes as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take the roll of Cherokee citizens of 1880 (not including freedmen) as the only roll intended to be confirmed by this and preceding acts of Congress, and to enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll to persons whose names are found thereon; and all persons who have been enrolled by the tribal authorities who have heretofore made permanent settlement in the Cherokee Nation whose parents, by reason of their Cherokee blood, have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other rolls, and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to citizenship under Cherokee laws.

"It shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the 3d day of February, 1896.

* * * * * * *

"The several tribes may, by agreement, determine the right of persons who for any reason may claim citizenship in two or more tribes, and to allotment of lands and distribution of moneys belonging to each tribe; but if no such agreement be made, then such claimant shall be entitled to such rights in one tribe only, and may elect in which tribe he will take such right; but if he fail or refuse to make such selection in due time, he shall be enrolled in the tribe with whom he has resided, and there be given such allotment and distribution and not elsewhere.

"No person shall be enrolled who has not heretofore removed to and in good faith settled in the nation in which he claims citizenship.

* * * * * * *

"Said commission shall make such rolls descriptive of the persons thereon, so that they may be thereby identified, and it is authorized to take census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls. They shall have access to all rolls and records of the several tribes, and the United States court in Indian Territory shall have jurisdiction to compel the officers of the tribal government and custodians of such rolls and records to deliver same to said commission, and on their refusal or failure to do so to punish them as for contempt; as also to require all citizens of said tribes, and persons who should be so enrolled, to appear before said commission for enrollment, at such times and places as may be fixed by said commission, and to enforce obedience of all others concerned, so far as the same may be necessary to enable said commission to make rolls as herein required, and to punish anyone who may in any manner or by any means obstruct said work.

"The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.

"The members of said commission shall, in performing all duties required of them by law, have authority to administer oaths, examine witnesses, and send for persons and papers; and any person who shall willfully and knowingly make any false affidavit or oath to any material fact or matter before any member of said commission, or before any other officer authorized to administer oaths, to any affidavit or other paper to be filed or oath taken before said commission, shall be deemed guilty of perjury, and on conviction thereof shall be punished as for such offense."

To the foregoing legislation there has been added the following provision in the Indian appropriation bill of May 31, 1900:

"That said commission shall continue to exercise all authority heretofore conferred on it by law. But it shall not receive, consider, or make any record of any application of any person for enrollment as a member of any tribe in Indian Territory who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such, and its refusal of such applications shall be final when approved by the Secretary of the Interior."

The classes to be considered under both of the acts quoted are Cherokees by blood and intermarriage, adopted Delawares, adopted Shawnees, and freedmen.

The tribal rolls were found to be in a state of great confusion, and it was early seen that to secure accuracy and to make anything approaching satisfactory progress, indexes would first have to be made of the principal rolls of the nation. Such aids requiring great labor and care, were prepared of the roll of 1880, comprising 20,439 names, the strip payment roll of 1894 of 24,989 names, and the census roll of 1896 of 33,008 names.

This work being completed, the commission advertised appointments in the Cherokee Nation for the enrollment of Cherokee citizens. These appointments extended from May 14 to December 20, 1900, but owing to unforeseen circumstances it was found impossible to

begin this work prior to July 9, and these appointments were canceled. New appointments were announced, and they were kept as follows:

Fairland, from Monday, July 9, to Friday, July 13, inclusive.
Westville, from Monday, July 16, to Friday, July 20, inclusive.
Stilwell, from Monday, July 23, to Friday, July 27, inclusive.
Bunch, from Monday, July 30, to Friday, August 3, inclusive.
Sallisaw, from Monday, August 6, to Friday, August 10, inclusive.
Muldrow, from Monday, August 13, to Friday, August 17, inclusive.
Fort Gibson, from Monday, August 20, to Friday, August 31, inclusive.
Pryor Creek, from Monday, September 10, to Friday, September 14, inclusive.
Vinita, from Monday, September 17, to Friday, October 5, inclusive.
Bartlesville, from Monday, October 8, to Friday, October 12, inclusive.
Nowata, from Monday, October 15, to Friday, October 19, inclusive.
Claremore, from Monday, October 22, to Friday, November 16, inclusive.
Chelsea, from Monday, November 19, to Friday, November 23, inclusive.
Tahlequah, from Tuesday, November 27, to Thursday, December 20, inclusive.

After the close of the appointment at Tahlequah the Cherokee enrollment division returned to Muskogee and remained there during the remainder of the winter and until March 30, 1901, continuing enrollment work and perfecting the records and deposition of the data accumulated in the field.

Shortly after beginning the enrollment in the Cherokee Nation it was found impracticable to hear applications of freedmen for enrollment at the appointments which had been given out, owing to the great number of Cherokees who appeared before the commission, the great number of contested cases among freedmen applicants and the varied provisions of law applicable to the different classes of citizens and claimants. Consequently the freedmen were notified that their applications would be heard during the early part of the year 1901. This assured greater care in taking the cases and greater convenience to all concerned, and it was accepted as a satisfactory arrangement.

The following is a copy of the instructions issued by the department, based upon the decree of the Court of Claims, under which the hearing of freedmen has thus far progressed. (See pp. 18–21.)

In preparing the rolls of this nation many difficulties are encountered. Among the full bloods it is often found very difficult to identify them on the rolls. The full-blood Indian is frequently known, at different periods, by different names, his recollection is exceedingly poor, and from this arises great delay and many variations of names, which have to be explained and established as best may be. It frequently requires an hour or more to identify and determine the name of a full-blood Indian.

In the preparation of the freedmen rolls the greatest difficulty encountered is in the cases which are being contested by the representa-

tives of the Cherokee Nation. Many witnesses are introduced on both sides, and the record in such cases is becoming very voluminous, amounting in some instances to more than a hundred pages of single-space typewritten matter in a single case. Yet the record in these cases is by no means completed, as both the attorneys for the Cherokee Nation and for the applicants have signified their intention to introduce much additional evidence. It is safe to say that more difficulties are encountered in making an accurate roll of the Cherokee freedmen and more time will be so consumed than with all the balance of the Cherokee Nation.

Listed for rejection for lack of jurisdiction under act of May 31, 1900 (all classes).	733
Listed for enrollment on regular Cherokee freedmen cards (no contest or objection)	3,150
Cherokee freedmen applicants listed for rejection	285
Listed on doubtful Cherokee freedmen cards (including contested cases)	2,428

RECAPITULATION.

Number of persons included in applications heard up to and inclusive of June 30, 1901, as Cherokees, Shawnees, Delawares, by blood and intermarriage, and freedmen:	
On regular cards	28,511
On doubtful cards	5,297
On rejected cards	1,064
Memorandum cases (act May 31, 1900)	733
Grand total to July 1, 1901	35,605

A considerable number of those listed as "doubtful" will in all probability be found entitled to enrollment, but it is impossible at this time to accurately approximate such number. It is believed that nearly all who have any ground upon which to claim a right to enrollment have applied, except a considerable body of full-bloods, the number of which it is difficult to estimate. At the close of this fiscal year there are still a little over 7,000 persons on the authenticated roll of 1880 who have not been enrolled or accounted for. Of this number many will be found to have died, but many are living and have families. Allowing for all contingencies and attempting to approximate what the total final enrollment of the Cherokee Nation may be, the number can be estimated at not less than 35,000 nor more than 38,000 persons.

The future work of the Cherokee enrollment division will consist chiefly in securing the enrollment of the outstanding claimants just referred to, taking additional testimony and hearing argument in doubtful and contested cases, reviewing for final presentation to the commission and to the Department of the Interior all of the cases and testimony, and such clerical work as is necessary to the final and proper preparation of the papers and rolls.

To properly estimate this work, as well as the character of that which has been done during the past twelve months, it should be noted that the duties of the commission are largely judicial in their character. It must enroll certain persons with respect to the roll of 1880, "and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law," as well as comply with numerous other requirements set forth in the law. An estate is to be divided upon the principle of equal value among

the heirs, and persistent contests are waged to prove a right of inheritance. Many rightful claimants are too ignorant to prove their rights, too poor or infirm to reach the appointments of the commission, and very many full-bloods still refuse to concur in any way in the policy of the Government. The cases of the ignorant have to be developed by the examining official—often their testimony has to be gathered for them—and means must yet be devised to bring in or go to many who are helpless and to overcome the unwillingness of the remaining full-bloods.

Over 25,000 pages of single-space typewritten testimony has been taken and must be considered, with thousands of accompanying papers, in determining the rights of claimants. Very much, of course, will be added to this before the enrollment work in the Cherokee Nation is completed.

(From report of the Commission to the Five Civilized Tribes for year ending June 30, 1902, pp. 28 to 35, inclusive.)

CHEROKEES.

CITIZENS BY BLOOD AND INTERMARRIAGE.

Much difficulty having been experienced by the commission in effecting agreements with the several tribes which should enable the citizenship rolls to be closed, Congress in the Indian appropriation bill of March 3, 1901 (31 Stat. L., 1073) embodied legislation calculated to overcome this obstacle. The provision referred to is as follows:

"* * * the Secretary of the Interior is authorized and directed to fix a time by agreement with said tribes, or either of them, for closing said roll, but upon failure or refusal of said tribes or any of them to agree thereto then the Secretary of the Interior shall fix a time for closing said rolls, after which no names shall be added thereto."

It will be remembered that up to that date all efforts to consummate an agreement with the Cherokees had failed; and while agreements had been made with the other four tribes, that with the Choctaws and Chickasaws did not cover this important feature.

In November, 1901, under instructions from the department, the commission renewed its efforts to negotiate an agreement with the Cherokees fixing the date for closing their rolls. Being unsuccessful at that time, a further effort was made in December, 1901, also without result. Thereupon the Secretary of the Interior, acting under the provision of law above quoted, on January 15, 1902, directed the commission to receive no applications for enrollment as Cherokee citizens after July 1, 1902.

During the latter portion of the summer and early winter of the year 1901 the commission took agressive action looking toward an early completion of the work of the enrollment of Cherokees. From September 1 to December 1 the commission was constantly engaged at various points in the Cherokee Nation hearing original applications for enrollment and supplemental and rebuttal testimony in contested cases.

In the eighth annual report of the commission only brief mention was made of the work involved in the preparation of rolls of Cherokee freedmen.

Shortly after beginning the enrollment of the Cherokee freedmen it was found impracticable to hear all of the supplemental and rebuttal testimony introduced for and against contested claimants at the appointments announced for the enrollment of freedmen, owing to the vast amount of evidence submitted. Consequently they were informed that appointments for this purpose, convenient for them to reach, would be held early in the fall of the year 1901.

On the 1st day of September the commission entered upon an appointment at Fort Gibson, Ind. T., for the purpose above mentioned. After the conclusion of the session at that place, September 30, an appointment was filled at Vinita, Ind. T., until November 1. During that time many witnesses were introduced, both by the claimants and by the Cherokee Nation, and the record in many cases is extremely voluminous.

In order to hasten the completion of this class of work the commission early in the month of March, 1902, notified by registered mail all freedmen who had been previously listed as doubtful claimants that it would continue these hearings at Muskogee, Ind. T., until May 31, 1902, and after that date all such cases would be deemed complete and the commission would proceed to render its decisions therein as soon as possible. This was accepted as a most satisfactory arrangement by all concerned. Owing to the mass of evidence received and the demands of other work it has not yet been possible to render decisions in such cases.

In the preparation of decisions in cases of this character much care and labor will be required, as the record in many instances covers from 25 to 50 pages of single-space typewritten matter, which must necessarily be carefully read and briefed before a proper decision can be rendered.

A copy of the instructions issued by the department, based upon the decree of the Court of Claims, under which the hearing of freedmen applications has been conducted, will be found appended. (See pp. 18–21.)

On the 16th day of August, 1901, the commission was notified that on the 28th day of that month the Cherokee Nation, through counsel, would apply to the United States Court for the Northern District of Indian Territory, sitting at Muskogee, for an order enjoining the commission from hearing the applications of or enrolling certain Cherokee freedmen mentioned in the petition, and their descendants, for the reason that neither they nor their descendants are found on the Cherokee roll of 1880, and enjoining and restraining the Commission from hearing the applications of or enrolling any colored persons or freedmen claiming citizenship in the Cherokee Nation born prior to 1880 whose names do not appear on said roll, and their descendants born since the roll of 1880 was compiled. The opinion of the court will be found appended.

Since the rendition of this opinion no further action has been taken by the court, and the commission has made only memoranda of the applications of such freedmen as come within the provisions of the foregoing opinion.

(From report of Commission to the Five Civilized Tribes for year ending June 30, 1903, pp. 18 to 28, inclusive.)

CHEROKEES.

In the preparation of the final rolls of the citizens and freedmen of the Cherokee Nation the commission has had to deal with six classes of applicants, each class deriving its rights from a different source:

1. Native-born Cherokees.

2. Persons of Cherokee blood, not born within the geographical limits of the nation, but who have been admitted to citizenship by formal acts of the Cherokee tribal authorities, by the commission to the Five Civilized Tribes, or by the United States Court in Indian Territory on appeal from the decisions of the commission, under the act of Congress of June 10, 1896 (Appendix No. 1, p. 62), and their descendants.

3. Persons of Shawnee blood who acquired rights under the provisions of an agreement between the Cherokee Nation and the Shawnee tribe of Indians, concluded June 7, 1869, and approved by the President of the United States June 9, 1869, and their descendants. This class embraces a few persons not Shawnees by blood, but who removed to the Cherokee Nation with the Shawnees and whose names appear as adopted members of the tribe on the register made in pursuance of the terms of the agreement.

4. Delawares by blood, who acquired rights under the provisions of an agreement entered into between the Cherokee Nation and the Delaware tribe of Indians April 8, 1867.

5. Persons deriving their rights from intermarriage with recognized citizens of the Cherokee Nation, of either Cherokee, Delaware, or Shawnee blood.

6. Cherokee freedmen, who acquired rights under the provisions of the treaty between the United States and the Cherokee Nation concluded July 19, 1866.

In the enrollment of applicants of the first, third, and fourth classes little difficulty was experienced beyond simply the labor of taking so large a number of personal applications and recording the proceedings, residence within the nation and tribal enrollment being the vital prerequisites.

The force and validity of acts of the Cherokee national council, the authority and regularity of the proceedings of various commissions charged with passing upon the rights of claimants to Cherokee citizenship, the compliance or noncompliance of such claimants with the terms upon which their admission was conditioned or with the laws of the Cherokee Nation regulating citizenship, and not infrequently, the identity of the applicants as persons previously admitted to citizenship, are considerations which enter largely into the determination of the rights of applicants of the second class.

It was in applications of the fifth and sixth classes, however, that the most serious difficulties arose. In the enrollment of Cherokee freedmen, other than those identified upon the authenticated roll of 1880, every inch of ground was contested, and a mass of evidence, much of it irrelevant and immaterial, was introduced by both sides. The real issues were often so obscure as to require much patience and

diligence in sifting the evidence for the facts and arriving at a proper determination of the rights of the applicants.

The questions to be considered in determining applications of the fifth class are mainly legal ones, which may more properly be dealt with under the head of "Decisions."

THE FINAL ROLL.

Immediately upon the ratification of the Cherokee agreement by the members of that tribe, the commission addressed itself to the work of preparing, for transmission to the Secretary of the Interior, lists or schedules of persons entitled to enrollment, as provided in section 29 of said agreement, which reads as follows:

"SEC. 29. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said commission shall, from time to time, and as soon as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the commission to be entitled to enrollment. The lists thus prepared when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe, upon which allotment of land and distribution of other tribal property shall be made. When there shall have been submitted to, and approved by, the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete. The roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes."

Up to the close of the year the names of 28,016 Cherokee citizens were so scheduled. This number includes those of both Cherokee and Shawnee blood, and also 1,145 citizens by intermarriage. Schedules embracing the names of 27,033 Cherokee citizens, 1,145 of whom are citizens by intermarriage, have been approved by the Secretary of the Interior. The names of 2,749 Cherokee freedmen have also been scheduled under the provision of law above quoted, and their final enrollment has been approved by the Secretary of the Interior.

The remaining schedules are being prepared as rapidly as the rights of the applicants can be determined. In some cases additional evidence is required, which the applicants have been notified to supply, while in numerous instances advantage is taken of the applicant's appearance at the Cherokee land office to select his allotment, and he is required to complete the record in the matter of his application for enrollment as far as possible before leaving the office.

The following table shows the total number of persons whose applications for enrollment await final action by the commission or by the department and their classification:

On regular cards:		
Citizens of Cherokee or Shawnee blood	3,828	
Intermarried whites	1,261	
Delaware-Cherokees	1,096	
Freedmen	571	
		6,756

On doubtful cards:		
Citizens of Cherokee or Shawnee blood	2,427	
Intermarried whites	534	
Delaware-Cherokees	31	
Freedmen	3,223	
		6,215

NOTE.—The above includes those embraced in the general application of June 30, 1902, many of whom will doubtless be found to be dead or can never be identified.

On rejected cards:		
Citizens of Cherokee or Shawnee blood	50	
Intermarried whites	33	
Freedmen	369	
		452
Memoranda cases (act of May 31, 1900)		6
Total		13,429

Inasmuch as it is impossible to make final allotments of land to Delaware Indians until their suit now pending in the Supreme Court of the United States has been finally determined, the names of this class of Cherokees have not been placed upon the schedules or partial rolls of citizens forwarded to the Secretary of the Interior. The suit in question was brought by the Delawares for the recognition of their claim to certain lands in the Cherokee Nation over and above their pro rata share as Cherokee citizens. Early in the present calendar year the Court of Claims rendered a decision adverse to the complainants, and appeal was thereupon taken to the Supreme Court, where the case is still pending.

DECISIONS.

In September of the past fiscal year the commission addressed itself to the preparation of decisions in doubtful freedmen cases. The rights of applicants of this class have been vigorously contested. The attorneys for the applicants and for the Cherokee Nation, in addition to submitting briefs, desired to present their views in oral argument before the full commission. Their wishes in this respect were granted, and the law clerks charged with the preparation of the cases for decision were also given an opportunity to hear the arguments of counsel, which developed a broad divergency of view. The attorneys for the Cherokee Nation contended that only those freedmen whose names were found on the 1880 roll and their descendants were entitled to enrollment, while counsel for the applicants claimed that nothing short of the enrollment of all those whose names appear on the Kern-Clifton roll of 1897 and their descendants could be called a strict compliance with the decree of the Court of Claims in the case of *Moses Whitmire* v. *Cherokee Nation*. (Appendix No. 3, p. 130.) Both theories were pressed with vigor.

The commission in receiving applications and classifying freedmen applicants has been guided by the instructions of the Secretary of the Interior as contained in his letter of May 11, 1900. (Appendix No. 4, p. 144.) As the views of both the attorneys for the Cherokee Nation and for the applicants were at variance with the departmental view, it was deemed advisable to prepare a test case for submission to the Secretary of the Interior. The consolidated case of Henry C. Hayden et al. (Cherokee Freedman D 498), was selected for this

purpose as involving the most important issues arising in this class of applications. One of the applicants claimed citizenship by intermarriage. In September, 1902, the commission rendered its decision therein, denying the applications on the ground that the applicants had not complied with the provisions of the treaty of 1866. The decision, together with briefs submitted by counsel for both parties, was forwarded to the Secretary of the Interior for his consideration. The department approved this decision, but no opinion was rendered as to whether a person of negro blood can acquire rights by virtue of intermarriage. This question, however, is involved in the case of Thomas York (Cherokee D 256), now pending before the department. There are 136 applicants who claim the right to enrollment as Cherokee freedmen by virtue of intermarriage.

The injunction proceedings growing out of the enrollment of Cherokee freedmen, mentioned in the commission's ninth annual report, have not yet been determined and the suit is still pending in the United States Court for the Western District of Indian Territory.

The following table shows the number of cases and the applicants embraced therein in which final decisions have been rendered since July 1, 1902, together with the action of the Secretary of the Interior on such cases as were transmitted to the department. Decisions of the commission enrolling applicants against whom no protest is entered by the attorneys for the Cherokee Nation are, under instructions, not forwarded to the department for approval, but the names of such applicants are embraced in the schedules forwarded for approval. The figures include applicants listed under the general application of June 30, 1902.

Number of cases in which applicants have been denied enrollment (exclusive of memoranda cases)	247
Number of cases in which applicants have been enrolled	588
Number of cases in which part of the applicants have been denied and part enrolled	118
Memoranda cases (denied under act of May 31, 1900)	83
Total number of cases in which decisions have been rendered during the year	1,036
Number of decisions approved by the department	418
Number of applicants embraced therein	643
Number of decisions reversed by the department	9
Number of applicants embraced therein	15
Number of decisions remanded by the department for further proceedings	38
Number of applicants embraced therein	110
Total number of persons enrolled by order of the commission or by the department on appeal	1,662
Total number of persons denied enrollment by the commission and approved by the department (exclusive of memoranda cases)	466
Total number of persons denied enrollment under the act of May 31, 1900	271
Total number of applicants whose applications have been dismissed and such action approved by the department	39
Total number of applicants embraced in decisions rendered by the commission during the year	2,438

The persons whose applications have been disposed of are classified as follows:

Cherokees	1,623
Delaware-Cherokees	31
Shawnee-Cherokees	97
Intermarried whites	412
Freedmen	10
Memoranda cases (all classes)	271
Total	2,438

The status of all applicants for enrollment as citizens of the Cherokee Nation on June 30, 1903, is shown by the following table:

Status of applicants.

	On schedules approved by the department.	On schedules not yet approved by the department.	Refused.	Undetermined.
Cherokees by blood (including Shawnees)	25,888	983	47	6,305
Cherokees by intermarriage	1,145		576	1,828
Delaware-Cherokees			3	1,127
Freedmen	2,749		12	4,163
Memoranda cases (all classes)			1,322	6
Total	29,782	983	1,960	[1] 13,429

[1] See note on p. 21 (Rec., p. 71).

(From report of Commission to the Five Civilized Tribes for year ending June 30, 1904, pp. 24 to 26, inclusive.)

CHEROKEES.

No original applications for enrollment as citizens or freedmen of the Cherokee Nation have been received since October 31, 1902. Perhaps greater difficulty has been experienced in the preparation of the final rolls of the Cherokees than in any other tribe. The rights of intermarried whites and freedmen have been the subject of protracted litigation. As a result the commission has much of the time been powerless to proceed with the enrollment of these classes of citizens, and even now the rights of the intermarried citizens are being contested in the Court of Claims, so that nothing can be done by the commission as to their enrollment.

The injunction of the United States court against the enrollment of a certain class of Cherokee freedmen, mentioned in the commission's tenth annual report (Appendix No. 6, p. 142) was dissolved on August 25, 1903, and, no appeal having been taken, the work of deciding cases which had been suspended by reason of the injunction proceedings was immediately taken up. The applicants coming within this class have been placed upon enrollment cards, thus increasing the total number of applicants for enrollment as Cherokees from 46,150, as stated in the commission's tenth annual report, to 46,418. Their general status may be shown in brief as follows:

Enrolled by commission and approved by department	34,474
Enrolled by commission and not yet approved	976
Rejected	1,568
Undetermined	9,400
Total	46,418

It will be seen that at the close of the year approximately four-fifths of the enrollment work of the Cherokee Nation has been completed.

In many of the cases undetermined it was necessary to secure additional testimony, and this has been done during the past year, so that the work of preparing decisions may now be pursued with less hindrance than has heretofore been encountered.

Evidence of the death, prior to September 1, 1902, of 101 applicants for enrollment as citizens and freedmen of the Cherokee Nation has been filed with the commission during the year. These were classed as follows:

Cherokees by blood on straight cards	73
Cherokees by blood on doubtful cards	9
Cherokees by blood on rejected cards	6
Cherokee freedmen on straight cards	4
Cherokee freedmen on doubtful cards	7
Cherokee freedmen on rejected cards	2
Total	101

In this connection it may be important to explain the significance of the terms "straight," "doubtful," and "rejected." When the original applications for enrollment were received those persons who were, from the testimony submitted, clearly entitled to be enrolled, were placed upon what were known as "straight cards;" those whose right to enrollment seemed doubtful were placed upon the so-called "doubtful cards," and others who appeared to have no tangible right to enrollment were placed on "rejected cards." It sometimes happens, therefore, that an applicant placed upon a straight card is rejected by the final judgment of the commission or the department, while another, whose name was originally listed upon a rejected card, may eventually be enrolled.

Under an opinion of the Assistant Attorney General for the Interior Department, dated January 13, 1904 (Appendix No. 7, p. 166), it was held that the limitation prescribed by the treaty of 1866 for the return of freedmen to Indian Territory did not begin to run until the date of ratification of the said treaty, viz, August 11, 1866. This necessitated the review of a number of cases previously decided by the commission upon the theory that the limitation began from the date of the conclusion of the treaty, the main question involved in such cases being whether or not the applicant returned to Indian Territory within the time prescribed by the terms of the treaty.

Applications for enrollment as intermarried freedmen of the Cherokee Nation have been made by 151 persons, whose cases have not been determined. A test case has been submitted to the Department wherein it is held by the commission that no person is entitled to enrollment as a Cherokee freedman by intermarriage. The commission is not yet advised of departmental action in this case, but as soon as the matter is finally determined will proceed to dispose of the remaining 150 cases of this character.

Decisions have been prepared by the commission during the fiscal year in 891 cases. By these decisions 1,121 applicants are granted the right of enrollment as citizens of the Cherokee Nation, the applications of 1,344 are refused, and the cases of 14 dismissed. The class to which the applicants belong is shown by the following table:

	Enrolled.	Refused.	Dismissed.
Cherokees, including Shawnees	512	110	8
Delaware-Cherokees	7	7	
Freedmen	601	1,223	6
Memoranda cases	1	3	
Intermarried freedmen		1	
Total	1,121	1,344	14

It will be understood that in cases where applicants are clearly entitled to enrollment and no objections raised on the part of the nation the preparation of a decision is dispensed with, the names of the applicants being placed upon schedules and submitted to the Secretary of the Interior for approval; but in those cases where decisions are prepared the names of the applicants are not so scheduled until the decision of the commission has been affirmed by the Secretary of the Interior.

During the past year schedules or partial rolls have been prepared containing the names of 5,668 citizens and freedmen of the Cherokee Nation, as follows:

Cherokees by blood, including Shawnee-Cherokees and Delaware-Cherokees	4,949
Cherokee freedmen	524
Registered Delaware-Cherokees	195
Total	5,668

These have all been approved by the Secretary of the Interior, except as to 976 names not yet acted upon. The total number of persons whose names have been scheduled up to the close of the year is as follows:

Cherokees by blood, including Shawnee-Cherokees and Delaware-Cherokees	30,837
Intermarried whites	1,145
Cherokee freedmen	3,275
Registered Delaware-Cherokees	195
Total	35,450

The names of 1,145 intermarried citizens were scheduled before the suit against this class of citizens was instituted in the Court of Claims, but action as to the allotment of land to those so scheduled or the final enrollment of other applicants of the same class has been suspended.

While the Cherokee enrollment work is less nearly completed than that of any other tribe, it is believed that the same will be finished in ample time for the commission to wind up the allotment work in the Cherokee Nation within the time prescribed by law.

(From report of Commission to the Five Civilized Tribes for year ending June 30, 1905, pp. 8 and 9.)

ENROLLMENT OF CITIZENS.

The work of enrolling the members of the Five Tribes in Indian Territory may be classed under three general heads:

First, the reception of applications for enrollment.

Second, the determination of the rights of the applicants.

Third, the actual placing of the names of those entitled to be enrolled upon the final rolls for approval by the Secretary of the Interior.

The first has occupied a space of nearly nine years, the work having been commenced under the act of June 10, 1896, and ended June 2, 1905, with the expiration of the time allowed for the enrollment of Seminole children by the act of March 3, 1905. Obviously the completion of the work assigned to the commission was an impossibility so long as the rolls were kept open by law and names were being constantly added to them. It is believed that since the reception of applications was commenced ample opportunity has been afforded every person who has any claim to citizenship in Indian Territory to lay his case before the commission. The commission's enrollment parties have visited every part of the Indian Territory, carrying its voluminous records and its extensive camping paraphernalia into regions rarely if ever before visited by the white man. More than 100,000 citizenship claims have been presented to the commission, and volumes of testimony and evidence have been submitted in connection with them. It has required an elaborate system of records and indexes to keep track of these numerous applications, and the constant correspondence in connection therewith has reached into hundreds of thousands of letters.

In the second procedure it is necessary to have the service of law clerks who are familiar not only with the United States laws governing the enrollment of these Indians, but with their own tribal laws and customs under which citizenship rights were acquired and lost. Where applicants are shown by the tribal records to be beyond question bona fide citizens of the respective tribes, the determination of their right to final enrollment is a simple matter. But many persons were manifestly entitled to be enrolled whose citizenship status was not a matter of record with the tribes, and many others were named upon the tribal rolls who were in no wise entitled to share in the distribution of their common property. In other cases the rights of the applicants were dependent upon acts alleged to have been performed by their ancestors a half or three-quarters of a century ago, and of which a very imperfect record was made. Able counsel has been employed both by the tribes and by the applicants for enrollment, and every possible phase of the law has been exploited. The final decision of the department in a single case is often the pivot upon which the rights of hundreds of applicants turn. The enormous value of the property involved warrants the slow and careful procedure which has characterized the work of the commission and the department. Such cases as now remain in the hands of the commission are those which depend upon the outcome of pending litigation or the final decisions of the department upon important legal ques-

tions, and it seems that after almost a decade of unceasing toil the task of adjudicating the rights of applicants for enrollment as members of the Five Tribes is about to be completed.

The third step is a perfunctory one which consumes little time, accuracy being the most important factor. The rolls are made up in parts or schedules and submitted to the department for approval from time to time, so that the final roll can be completed almost simultaneously with the determination of the enrollment cases now pending. They are by provision of law, "descriptive of the persons thereon," i. e., they not only give the name, but also indicate the age, sex, degree of blood, etc., of each person enrolled.

(From report of Commission to the Five Civilized Tribes for year ending June 30, 1905, pp. 23 to 27, inclusive.)

CHEROKEES.

Under the provisions of section 21 of the act of Congress of June 28, 1898, commonly known as the Curtis Act, supplemented by provisions contained in the act of May 31, 1900, the Commission to the Five Civilized Tribes, on July 9, 1900, began the task of preparing a correct roll of citizens of the Cherokee Nation. On May 11, 1900, applications for enrollment as Cherokees by blood and Cherokee freedmen were received at the central office at Muskogee, but the work was necessarily discontinued at that time, and it may therefore be said that the actual work of preparing the Cherokee rolls was begun on July 9, 1900. Beginning on that day the commission advertised appointments up to and including December 20, 1900, at fourteen points in the Cherokee Nation. A field party was organized and equipped with office facilities under canvas, as well as tents for the accommodation of two commissioners and the employees. The enrollment work in the Cherokee Nation was mainly done in camp until the summer of 1902. In all instances the testimony of applicants for enrollment was stenographically recorded. The Cherokee Nation assisted in making the rolls by having two representatives present to aid in the identification of applicants, or to interrogate those whose rights were questioned.

Only applications for enrollment as citizens by blood, intermarriage, and as Shawnees and Delawares adopted into the Cherokee Tribe were received during the first year of this work. The following year, from April to November, the commission was engaged in the field in hearing applications for enrollment as Cherokee freedmen.

Later, from April to June, 1902, four special field parties were sent into neighborhoods inhabited by those full-bloods opposed to enrollment, and listed them for enrollment from information obtained from witnesses acquainted in the neighborhoods where they resided.

This virtually completed the commission's field work in the Cherokee Nation, as subsequent field parties have been small and sent out for a short time only for special purposes.

On July 1, 1902, being the date fixed by the Secretary of the Interior for the closing of the Cherokee rolls (until the Cherokee agreement of July 1, 1902, extended the time to October 31, 1902), all persons whose names appeared on the 1880 authenticated roll or on the 1906 census roll of citizens of the Cherokee Nation and their descend-

ants were included in a general application, so as to preserve their rights under the law. The names of 2,269 persons were listed for enrollment in this manner. The general application was restricted to these two rolls, as the other rolls are notoriously unreliable, and these two omit few, if any, persons or heads of families who have any rights as Cherokee citizens.

The total number of persons who applied for enrollment as citizens of the Cherokee Nation within the time prescribed by law is 46,464. The increase over the number given in the last annual report is occasioned by the fact that prior to the closing of the Cherokee rolls many applications for enrollment were tendered in defective form, particularly applicable for enrollment of children born since the enrollment of their parents. These defective applications were not considered until subsequently perfected, but the record was then made as of the date of the original application.

The receiving of applications for enrollment and the listing of applicants by classes for further and careful consideration may be considered as the first stage of the work of preparing the Cherokee rolls. The next step was to review and dispose of the applications for enrollment. A large majority of the applicants were persons whose Cherokee citizenship had never been disputed, and whose names appeared on the tribal rolls. But there were also presented for the consideration of the commission applications from many persons who had been claimants for Cherokee citizenship, but whose rights had not been conceded by the tribal authorities.

Applications for enrollment were, for convenience, grouped into three classes as they were presented—"regular," "doubtful," and "rejected." This being only a field classification, indicated the strength or weakness of the case as originally presented rather than the final disposition which would be made of it. Persons listed upon "rejected" cards have in some instances been enrolled, while in other instances applicants placed upon "regular" cards have been denied. In addition to these three classes, those applying for enrollment whose applications came within the provisions of the act of Congress of May 31, 1900, were given still another classification as "memorandum" cases.

The disposition to be made of the applications classed as regular, rejected, and memorandum cases was comparatively easy. In a very large majority of the regular applications a review of the testimony established that there was no question of the applicant's right to enrollment, and where these rights were not protested by the Cherokee Nation the applicants were placed upon schedules constituting a part of the final roll of Cherokee citizens and submitted to the Secretary of the Interior for approval. The applications classed as rejected and memorandum cases presented but few difficult questions, and these applications were rapidly disposed of. In some cases lack of reliable evidence has delayed the final disposition of the applications.

The cases classed as doubtful presented the most serious problem. In practically all of these further hearings were had, and much testimony has been introduced both for and against the applicant. This is particularly true as to applicants for enrollment as Cherokee freedmen classed as doubtful.

The work of disposing of the applications was begun in January, 1902. The methods employed by the commission and the steps taken to identify or secure information concerning persons whose names were included in the general application of July 1, 1902, have been outlined in previous reports. It is not considered necessary to again enter into an explanation of these matters or outline the difficulties which have been encountered.

During the past fiscal year the Secretary of the Interior approved the final enrollment of citizens of the Cherokee Nation as follows:

Cherokees by blood, including Shawnees and nonregistered Delawares	1,420
Cherokee freedmen	650
Total	2,070

The total number of citizens and freedmen whose enrollment was finally approved by the Secretary of the Interior prior to July 1, 1905, is as follows:

Cherokees by blood, including Shawnees and nonregistered Delawares, not including 1,143 intermarried whites whose enrollment was approved but subsequently suspended	31,275
Cherokee freedmen	3,923
Registered Delawares	196
Total	35,394

On June 30, 1905, there were pending before the department for approval the following Cherokee schedules:

Cherokees by blood, including Shawnees and nonregistered Delawares	178
Cherokee freedmen	59
Total	237

The following table shows the present status of applicants for enrollment as citizens and freedmen of the Cherokee Nation:

On approved roll:		
Cherokees by blood	31,275	
Cherokee freedmen	3,923	
Delawares, registered	196	
		35,394
Enrolled subject to departmental approval:		
Cherokees by blood	178	
Cherokee freedmen	59	
		237
Enrollment suspended:		
Intermarried whites		1,143
Enrollment denied:		
Cherokees by blood	431	
Cherokee freedmen	1,204	
Delawares	8	
Intermarried whites	543	
Memoranda cases, act May 31, 1900	1,310	
		3,496
Pending before department on decisions:		
Cherokees by blood	149	
Cherokee freedmen	996	
Intermarried whites	127	
		1,272

Pending before commission:		
Cherokees by blood	1,156	
Cherokee freedmen	776	
Delawares	36	
Intermarried whites	1,776	
Memoranda cases	35	
		3,779
Dismissed:		
Died prior to September 1, 1902, and for other causes		1,143
Total number of applicants		46,464

Among the 776 freedmen whose rights have not been determined are likewise included the names of 211 persons listed from information upon this general application; and the 1,156 Cherokees by blood whose rights have not been determined are principally of that class, including only 360 persons for whose enrollment personal application was made.

(From Report of Commissioner to the Five Civilized Tribes for year ending June 30, 1906, pp. 38 to 42, inclusive.)

CHEROKEES.

The initiatory work of the Commission to the Five Civilized Tribes in the determination of right of claimants to citizenship in the Cherokee Nation arose under the act of Congress approved June 10, 1896. Under this act applications for the admission of approximately 50,000 persons to citizenship in the Cherokee Nation were submitted to the commission, and were finally adjudicated either by the commission or by the United States court on appeal. Of this number, only 274 applicants were found by either tribunal to be entitled to citizenship.

The actual work in the preparation of the rolls of Cherokee citizens under the act of June 28, 1898, was begun in May, 1900, and the consideration and disposition of the applications for enrollment received under that act has since occupied the time of the Cherokee enrollment division. The act of July 1, 1902 (32 Stat. L., 716), which was ratified by the citizens of the Cherokee Nation August 7, 1902, fixed September 1 of that year as the date for the closing of the rolls and October 31, 1902, as the limit within which applications for enrollment as Cherokee citizens could be received. The limitation for the reception of the original applications for enrollment as Cherokee citizens was later extended by the act of April 26, 1906, to December 1, 1905.

The total number of applicants for enrollment as citizens of the Cherokee Nation received to July 1, 1905, was 46,464. With the exception of the cases of intermarried white citizens whose rights were pending in the courts, to which reference is hereafter made, there was only a small per cent of cases yet to be determined when the commission passed out of existence. Those which were left over were the ones in which the rights of the applicants were the most difficult to determine and the most actively contested on the part of the applicants and the Cherokee Nation. This is especially true of the freedmen, where the mooted questions are whether or not the applicant or the ancestor through whom he claims was the slave of a Cherokee

citizen or a free colored person residing in the Cherokee Nation at the commencement of the Civil War, and, in the event he left the Territory during the war, whether or not he returned on or before February 11, 1867. The loss of reliable evidence in the lapse of forty years among a people as ignorant as the freedmen of the Five Civilized Tribes, and the faculty of this class of claimants for obtaining "made-to-order" evidence, required the most careful investigation of these cases in order to insure justice to both parties.

The date upon which a certain case was to be heard was announced in advance and due notice given to all parties interested. Often both sides brought a number of witnesses from the Territory and adjacent States, where the colored people sojourned during the war. As these witnesses had to be closely examined and cross-examined the trial and final disposition of the case was a slow process.

During the fiscal year hearings have been had in 310 cases, or an average of about one each working day. The testimony submitted on each side has to be carefully weighed and considered before a decision can be prepared. Until the act of April 26, 1906, settled the matter of rehearings, there was no assurance that the decision rendered by the commissioner or the department would be final.

	Finally enrolled.	Denied.	Dismissed.	Pending before the department.	Pending before commissioner.	Total.
Cherokees by blood	[1] 31,839	1,902	1,557	141	203	35,642
Cherokees by intermarriage		553	162	1,248	1,663	3,626
Cherokee new borns					4,361	4,361
Cherokee freedmen	4,110	1,794	217	664	170	6,955
Cherokee freedmen, new born					583	583
Total	35,949	4,249	1,936	2,053	6,980	51,167

[1] Not including 1,143 intermarried whites whose enrollment has been suspended, and 12 stricken from the roll.

(From report of the Commissioner to the Five Civilized Tribes for the year ending June 30, 1907, pp. 14 to 16, inclusive.)

CHEROKEES.

The reception of applications for the enrollment, under the act of Congress approved April 26, 1906, of minor children of Cherokee citizens, continued to July 26, 1906. There were received under this act applications for the enrollment of 5,963 children of Cherokees by blood and 749 children of Cherokee freedmen. None of these applications were disposed of prior to June 30, 1906.

In addition to the applications for these children, the cases of 4,884 other persons were before the commissioner for determination during the year. Of this number, the jurisdiction of the Commissioner had to be determined in the cases of 732 claimants. The act of Congress of July 1, 1902 (Cherokee agreement), which made provisions for the closing of the Cherokee roll and the allotment of the land of the Cherokees provided that the roll should be made as of September 1, 1902, and that the application of no person whomsoever for enrollment should be received after October 31, 1902.

This date remained the limit for the reception of applications for enrollment until the passage of the act of April 26, 1906, which extended the time to December 1, 1905, and provided that the records in charge of the Commissioner to the Five Civilized Tribes should be conclusive evidence as to whether an application was made within that time. Of these 732 persons only 3, who claimed the right to enrollment as Cherokee freedmen, were found to have applied for enrollment within the time provided by law.

The question of the right of intermarried white persons to enrollment as citizens of the Cherokee Nation was not settled until November 5, 1906, when the United States Supreme Court affirmed the decision of the Court of Claims of May 15, 1905, holding that

The act of Congress approved July 1, 1902, provided that no person who died prior to September 1, 1902, should be entitled to an allotment of land or should participate in the distribution of the tribal property. Evidence having been received of the death prior to September 1, 1902, of 336 persons on the approved roll of citizens by blood and 32 persons on the roll of Cherokee freedmen, the commissioner, after due notice to the heirs of all said persons, recommended to the department that their names be stricken from the roll. This recommendation was approved by the department.

In the case of 3 citizens by blood and 2 freedmen, attempts were made to show that the information as to the date of death was incorrect and, after hearing the evidence offered, the commissioner rendered decisions, which were approved by the department, holding the parties died prior to September 1, 1902.

After the passage of the act of April 26, 1906, fixing March 4, 1907, as the date for closing the rolls, claimants whose cases were pending began to prosecute the same more vigorously. As a result of the provision of the act of April 26, 1906, relative to the filing of motions for rehearing and review, there were filed a great many such motions in cases which had been decided adversely to the applicants. These motions, after having been properly noted upon the records, were forwarded, with recommendation, to the department for consideration. This required a reexamination of the cases both by the commissioner and the department.

During the year there were remanded by the department for rehearing and readjudication 6 cases affecting 14 applicants by blood and 16 cases affecting 232 applicants as freedmen.

Decisions of the commission and the commissioner, affecting 4,094 applicants, were passed upon by the department in addition to those mentioned heretofore.

Action of the department in Cherokee enrollment cases.

	Granted.	Denied.	Dismissed.	Total.
Cherokees by blood	55	495	11	561
Cherokee freedmen	171	801	4	976
Intermarried whites	30	2,527	.....	2,557
Total	256	3,823	15	4,094

The total number of citizens and claimants who applied for enrollment as Cherokee citizens under the provisions of the acts of June 28,

1898, July 1, 1902, and April 26, 1906, is 53,724. Their claims were divided as follows:

Applications for enrollment as Cherokee citizens.

Cherokees by blood, including Delawares and Shawnees	42,253
Cherokee freedmen	7,844
Intermarried whites	3,627
Total	53,724

The complete and final roll of Cherokee citizens, which has received the approval of the Secretary of the Interior, contains the names of 41,798 citizens, of whom 8,698 are full-blood Indians. The following table shows the classification of the 41,798 citizens:

Citizens enrolled in Cherokee Nation.

Cherokees by blood	31,400
Registered Delaware-Cherokees	197
Intermarried whites	286
Cherokee minors	4,991
Cherokee freedmen	4,305
Cherokee freedmen minors	619
Total	41,798

Report of Commissioner to the Five Civilized Tribes in reply to supplemental petition and showing how the final roll of freedmen of March 4, 1907, was made.

DEPARTMENT OF THE INTERIOR,
Washington, January 12, 1909.

The ATTORNEY GENERAL.

SIR: Referring to my letter of November 12, 1908, in which I informed you that a copy of the supplemental petition in the case of *Moses Whitmire, Trustee for the Freedmen of the Cherokee Nation*, v. *Cherokee Nation and the United States*, had been referred to the Commissioner to the Five Civilized Tribes at Muskogee, Oklahoma, with instructions to furnish certain information in his possession, I have the honor to inclose herewith a certified copy of his reply thereto for your use in preparing the answer to the suit now pending in the Court of Claims.

Very respectfully,

JESSE E. WILSON,
Assistant Secretary.

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Oklahoma, November 20, 1908.

The honorable the COMMISSIONER OF INDIAN AFFAIRS.

SIR: This office is in receipt of your letter of November 11, 1908 (Land 71474–1908), inclosing a copy of the supplemental petition in the case of *Moses Whitmire, Trustee for the Freedmen of the Cherokee Nation*, versus *The Cherokee Nation and the United States*, being cause No. 17209 in the Court of Claims. You state the petition was referred to the department by Honorable John Q. Thompson, Assistant Attor-

ney General, "with request that he be furnished with all the facts, circumstances, and evidence in the possession and knowledge of the department touching the claim set forth in the petition," said request being made under section 188 of the Revised Statutes of the United States. This office is requested "to take up this petition as a special and make such report with reference to the making of the roll of Cherokee freedmen as will enable the Attorney General to make an answer to the petition, and return it to this office at your earliest convenience."

For the purpose of this report the only paragraph of said supplemental petition requiring discussion is No. 6. It is admitted that the roll of Cherokee freedmen should have been made "in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six," in the case of *Moses Whitmire, Trustee for the Freedmen of the Cherokee Nation*, versus *The Cherokee Nation and the United States*, and of section 21 of the act of Congress approved June 28, 1898 (30 Stat., 495), and of the provisions of the act of Congress of July 1, 1902 (32 Stat., 716).

Section 25 of the act of July 1, 1902, provided that the roll of citizens of the Cherokee Nation should be made as of September 1, 1902, and that the names of all persons then living and entitled to enrollment on that date should be placed on said roll. Section 26 of said act provided that all persons living September 1, 1902, and entitled to be enrolled as provided in section 25 should be placed upon the roll, and that no child born thereafter to a citizen and no white person who intermarried with a Cherokee citizen since December 16, 1895, should be enrolled or should participate in the distribution of the tribal property of the Cherokee Nation. Section 27 of said act provides as follows:

"Such rolls shall in all other respects be made in strict compliance with the provisions of section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), and the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one)."

Section 21 of said act of June 28, 1898, provides, in part, as follows:

"That in making rolls of citizenship of the several tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take the roll of Cherokee citizens of eighteen hundred and eighty (not including freedmen) as the only roll intended to be confirmed by this and preceding acts of Congress, and to enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll to persons whose names are found thereon; and all persons who have been enrolled by the tribal authorities who have heretofore made permanent settlement in the Cherokee Nation whose parents, by reason of their Cherokee blood, have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to citizenship under Cherokee laws.

"It shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six."

In the making of the roll of Cherokee citizens the act of May 31, 1900, does not apply to Cherokee freedmen.

It appears plain, therefore, that the roll of Cherokee freedmen should be made "in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six." Such was the opinion of the Secretary of the Interior, under whose direction the law provided the roll of citizenship of the Cherokee Nation should be made, the Commission to the Five Civilized Tribes and the Commissioner to the Five Civilized Tribes.

Paragraph 6 of said supplemental petition reads as follows:

"Thereafter the said commission, commonly called the Dawes Commission, made up rolls of the citizens of the Cherokee Nation, but not in strict compliance with the provisions of section 21 of the act of Congress approved June 28, 1898 (30 Stat. L., 495), hereinbefore recited, nor in strict compliance with the decree of this honorable court passed in this cause February 3, 1896, and petitioner alleges that the particular in which it fails to conform to the said act of Congress and decree of this court, is that it has excluded from its rolls more than twelve hundred freedmen who were placed upon the rolls under the order and decree of this court of February 3, 1896, and their descendants, most of whom had also been on said authenticated rolls of 1880. Your petitioner further alleges that many of said freedmen who are thus wrongfully omitted from the rolls of said nation had taken homes upon the lands of said nation and improved them; that since the return of the said rolls on the Dawes Commission the Secretary of the Interior has denied their citizenship in the Cherokee Nation and has denied their right to the continued possession and enjoyment of their said homes and their right to participate in the allotment of said lands and the distribution of said funds and assets, and has in many cases allotted the homes of such individual freedmen to other members of the Cherokee Nation and has ousted many of such freedmen from their homes and is now preparing to oust the remainder of said freedmen from their said homes, all of which he will carry into effect unless he is prevented by appropriate order of this honorable court. Your petitioner further alleges that in the allotment and distribution made or preparing to be made by the Secretary of the Interior, as hereinbefore set out, said freedmen are and will be excluded from any participation whatever in the lands, assets, and funds of the Cherokee Nation in disregard of the said acts of July 1, 1902, June 28, 1898, and in violation of the injunction contained in the decree of this honorable court passed February 3, 1896, which provides that 'in the distribution of the proceeds and avails of the public domain or common property of the nation among the citizens thereof by distribution per capita at any time hereafter, the defendant, the Cherokee Nation, and the defendant, the United States, as trustee of the Cherokee Nation, be enjoined and prohibited from making any discrimination between the Cherokee citizens of Cherokee blood or parentage and Cherokee citizens who are or were freedmen, etc.'

"The premises considered your petitioner prays that this honorable court will pass a decree declaring the action of the said Dawes Com-

mission and the Secretary of the Interior whereby the names of said freedmen were excluded from the roll and citizenship of the Chero kee Nation be declared to be unlawful, and further enjoining and prohibiting the defendants, the Cherokee Nation, and the United States, as trustees for the Cherokee Nation, from making any discrimination between the said freedmen and other citizens of the Cherokee Nation in the allotment of lands and distribution of the said property and assets of said nation, and further enjoining the said defendant, and particularly the United States acting through the Secretary of the Interior, from further disturbing said freedmen in the possession and occupation of their said home and improvements, and further enjoining upon the said defendant, the United States, acting through the Secretary of the Interior, to reinstate such of said freedmen as have heretofore been ousted from the occupancy and possession of their said homes and improvements."

It will be noted that the only particular in which the petition alleges the roll of Cherokee citizens was not made "in strict compliance with the provisions of section 21 of the act of Congress approved June 28, 1898," or "in strict compliance with the decree of this honorable court passed in this cause February 3, 1896," is that "it has excluded from its roll more than twelve hundred freedmen who were placed upon the rolls under the order and decree of this court of February 3, 1896, and their descendants, most of whom had also been upon said authenticated rolls of 1880."

The parts of the decree of the Court of Claims in direct point are the following:

"And it appearing to the court that under the provisions of article 9 of the treaty of July 19, 1866, made by and between the Cherokee Nation and the United States, the said freedmen, who had been liberated by voluntary act of their former owners or by law, and all free colored persons who resided in the Cherokee country at the commencement of the rebellion and were residents therein at the date of said treaty, or who had returned thereto within six months of said last-mentioned date, and their descendants, were admitted into and became a part of the Cherokee Nation and entitled to equal rights and immunities and to participate in the Cherokee national funds and common property in the same manner and to the same extent as Chereokee citizens of Cherokee blood. * * *

"It being understood that the freedmen and their descendants and free colored persons above referred to shall include only such persons of said class as have not forfeited or abjured their citizenship of said Cherokee Nation at the date of the entering of this decree. * * *

"And it is further ordered and adjudged that, for the purpose of ascertaining and determining who are the individual freedmen of the Chereokee Nation now entitled to share in the distribution of the said sum of $903,365, the Secretary of the Interior be authorized to appoint three commissioners, one on the nomination of the complainant, and one on the nomination of the defendant, the Cherokee Nation, but both nominations to be approved by him, to proceed to the Cherokee country and hear the testimony both for and against the identity of all freedmen, free colored persons, and their descendants, claiming to be entitled to share in the distribution of said $903,365, that may be offered by the respective parties to this suit; and that each of said parties shall be entitled to be represented before said commis-

sioners, either at the taking of testimony in the Cherokee country or elsewhere; and that the said commissioners, in ascertaining the identity of the freedmen entitled to share under this decree, shall accept what is known as the authenticated Cherokee roll, the same now being on file in the office of the Secretary of the Interior, having been furnished to him and purporting to have been taken by the Cherokee Nation in 1880 for the purpose of showing the number of freedmen then entitled to citizenship in said nation under the terms of the treaty between the United States and the Cherokee Nation hereinbefore referred to, and their descendants; and the said commissioners shall ascertain who of said persons named on said rolls were alive and what descendants of said persons were alive on May 3, 1894, and no evidence shall be accepted by said commission tending to disprove the citizenship of any of the persons whose names appear upon said roll."

The statement contained in paragraph 6, to the effect that the "Dawes Commission has excluded from its rolls more than twelve hundred freedmen who were placed upon the rolls under the order and decree of this court of February 3, 1896, and their descendants, most of whom had also been on said authenticated rolls of 1880," is incorrect and misleading, for the following reasons:

First. The "twelve hundred freedmen who were placed upon the rolls under the order and decree of this court" who were "excluded from the rolls" of the Dawes Commission, is presumed to refer to persons claiming Cherokee freedmen citizenship who were denied the right of enrollment by the Secretary of the Interior, and whose names appear upon the Kern-Clifton roll. Such persons were not "placed upon the rolls under the order and decree" of the Court of Claims, nor were they found by the Court of Claims to be entitled to final citizenship in the Cherokee Nation. Under the court's decree a roll of said "freedmen and free colored persons aforesaid and their descendants" was to be made by a commission appointed by the Secretary of the Interior, and by that commission the "Kern-Clifton" roll was prepared. The decree made no provision for review by the Court of Claims of the proceedings of that commission, or for approval of the roll by the court, and on the contrary the commission was directed to report its roll, not to the court but to the Secretary of the Interior, and when it was approved by him the fund in control of the court was to be paid to the persons borne on the roll. The court decreed the *class* of freedmen and free colored persons, and not the individuals who were entitled to Cherokee citizenship, and to reason otherwise would be on the theory that the court delegated its judicial power to said commission and the Secretary of the Interior, which power the court could not delegate. The Congress did not regard enrollment upon the Kern-Clifton roll as an adjudication of right of the persons borne on that roll to final citizenship seems clear from the passage of the act of June 28, 1898, which provided that the Commission to the Five Civilized Tribes "shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six." That Congress so regarded such enrollment is further shown by the fact that the Kern-Clifton roll was not confirmed by Congress, as were other tribal rolls, among which is the 1880 Cherokee tribal roll above referred to.

Second. The commission, and the commissioner, to the Five Civilized Tribes and the department have always accepted the roll of 1880, made by the Cherokee Nation, as conclusive of the right to enrollment of all persons whose names are found thereon and their descendants and have considered their only duty in relation to those persons to ascertain who of the persons named on the roll and their descendants were alive, and to place their names on the roll, omitting those who have forfeited or abjured their citizenship in the Cherokee Nation. None of the "twelve hundred freedmen" referred to, presuming that they are of the class mentioned, are identified on the 1880 Cherokee tribal roll, unless they be such as have "forfeited or abjured their citizenship" since 1880.

In instructions received May 14, 1900, by the Commission to the Five Civilized Tribes from the Secretary of the Interior, the Secretary advised the commission that:

"The roll of 1880, made by the Cherokee Nation, is to be accepted by you as conclusive of the right of all persons whose names are found thereon and of their descendants to be enrolled by you. Your only duty in relation thereto is to ascertain who of the persons named therein are alive and who of their descendants are alive, and place their names on your roll, omitting, however, all who have forfeited or abjured their citizenship."

And that:

"It was intended that a full and complete roll should be made that should include the names of all freedmen, free colored persons, and their descendants, entitled to be recognized as citizens of the Cherokee Nation. It is your duty now to make such a roll, which shall include the names of all Cherokee citizens who are or were freedmen, who had been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the Cherokee country at the commencement of the rebellion, and were residents therein at the date of said treaty, or who returned thereto within six months thereafter, and their descendants."

The Commission to the Five Civilized Tribes, therefore, received applications for the enrollment of all persons claiming citizenship in the Cherokee Nation as "freedmen, who had been liberated by voluntary act of their former owners or by law, and all free colored persons who resided in the Cherokee country at the commencement of the rebellion, and were residents therein at the date of said treaty, or who had returned thereto within six months of said last-mentioned date, and their descendants," and decided each case according to the evidence introduced, and in receiving and deciding the cases the commission accepted "what is known as the authenticated Cherokee roll * * * taken by the Cherokee Nation in 1880 for the purpose of showing the number of freedmen then entitled to citizenship in said nation," and no evidence was accepted "tending to disprove the citizenship of any of the persons whose names appear upon said roll," the proper precaution being taken, however, to see that the roll "shall include only such persons of said class as have not forfeited or abjured their citizenship of said Cherokee Nation," and to determine who were living on September 1, 1902, as provided by the act of July 1, 1902.

The act of April 26, 1906 (34 Stat., 137), contains the following provision:

"The roll of Cherokee freedmen shall include only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants, who were actual personal bona fide residents of the Cherokee Nation August eleventh, eighteen hundred and sixty-six, or who actually returned and established such residence in the Cherokee Nation on or before February eleventh, eighteen hundred and sixty-seven; but this provision shall not prevent the enrollment of any person who has heretofore made application to the Commission to the Five Civilized Tribes or its successor, and has been adjudged entitled to enrollment by the Secretary of the Interior."

After the passage of this act due consideration was given this provision in the determination of cases since acted upon.

Section 11 of said act of July 1, 1902, provides that:

"There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee Tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements."

In the allotment of the lands of the Cherokee Nation there has been no "discrimination between the Cherokee citizens of Cherokee blood or parentage and Cherokee citizens who are or were freedmen who had been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the Cherokee country at the commencement of the rebellion and were residents therein at the date of said treaty or who returned thereto within six months thereafter, and their descendants," who were found to be entitled to enrollment and whose names were placed upon the roll of Cherokee citizens which has been approved by the Secretary of the Interior.

Those claimants for citizenship in the Cherokee Nation whose applications were denied have not, of course, been allotted land in the Cherokee Nation. Such claimants were, prior to the rejection of their applications for enrollment, permitted to make tentative allotment selections so as to protect their improvements and interests pending the final determination of their right to enrollment. After the final rejection of their applications their tentative allotment selections were canceled.

Relative to the allegation in paragraph 6 of said supplemental petition, to the effect that the Secretary of the Interior "has in many cases allotted the homes of such individual freedmen to other members of the Cherokee Nation and has ousted many of such freedmen from their homes, and is now preparing to oust the remainder of said freedmen from their said homes, all of which he will carry into effect unless he is prevented by appropriate order of this honorable court," and to the prayer:

" * * * that this honorable court will pass a decree declaring the action of the said Dawes Commission and the Secretary of the Interior, whereby the names of the said freedmen were excluded from the roll and citizenship of the Cherokee Nation, be declared to be unlawful, and further enjoining and prohibiting the defendants, the Cherokee

Nation, and the United States, as trustees for the Cherokee Nation, from making any discrimination between the said freedmen and other citizens of the Cherokee Nation in the allotment of lands and distribution of the said property and assets of said nation, and further enjoining the said defendant, and particularly the United States, acting through the Secretary of the Interior, from further disturbing said freedmen in the possession and occupation of their said home and improvements,"

it is probable that most, if not all, of the land held by freedmen claimants who were rejected has been allotted to duly enrolled citizens of the Cherokee Nation. The Secretary of the Interior and the officials under his direction have not "ousted" freedmen claimants "from their homes," nor are they "now preparing to oust the remainder of said freedmen (claimants) from their said homes." On the other hand, the Secretary of the Interior long ago instructed the United States Indian agent, who has jurisdiction, under the direction of the Secretary of the Interior, of the matter of placing allottees in the Cherokee Nation in the possession of their allotments (see section 21 of the act of July 1, 1902), to not proceed to remove from land in the Cherokee Nation claimants for enrollment as Cherokee freedmen whose claim for citizenship was in any wise pending, nor is any action now being taken by the United States Indian agent to place Cherokee allottees in possession of land now being held by persons who claimed freedmen citizenship in the Cherokee Nation whose enrollment was denied, but who may be parties to, or affected by, this case.

A copy of the supplemental petition is returned herewith.

Respectfully,

J. G. WRIGHT, *Commissioner.*

MAY 6, 1911.

The ATTORNEY GENERAL.

SIR: The department has received a communication (GMA), dated April 28, 1911, from John Q. Thompson, Assistant Attorney General, requesting, for use in the case of *Moses Whitmire, Trustee for the Freedmen of the Cherokee Nation*, vs. *The Cherokee Nation and the United States*, No. 17209, Court of Claims, copies of twelve or fifteen judgments rendered by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior, in rejected Cherokee freedmen cases selected as typical cases from the list of Cherokee freedmen contained in the decree of the court of February 20, 1911, in the above suit.

In compliance therewith there are inclosed copies of the judgments of the Commission to the Five Civilized Tribes and of the decisions of the Secretary of the Interior in the case of Burrell Daniels et al., and in a number of other Cherokee freedmen cases. I am advised by the Indian Office that at the hearings in these cases opportunity was afforded the parties interested, as well as the Cherokee Nation, to appear and submit evidence, and that the applicants either appeared in person or were represented by their attorneys. I am further advised by the Indian Office that the records in these enrollment cases are voluminous, and inasmuch as it was understood that

your department desired the information submitted herewith at the earliest possible date it was impracticable to cause copies of said records to be made.

There is also inclosed for your further information a copy of Indian Office letter of January 16, 1897, submitting to the department the Kern-Clifton roll and its accompanying papers, and your attention is invited to the fact that it was set forth therein that Commissioners Clifton and Kern joined in especially requesting the department to place upon the roll the names of Burrell Daniels and his family, and in this connection they said:

"It was not in the power of the commission to do this because the evidence shows that he did not return until 1870 or later, but the evidence also shows that at the conclusion of the war, he was sold by his owner, a Cherokee, into slavery into Mexico and kept there for five years until, by the interference of this Government he was taken from Mexican slavery and at once returned to the Cherokee Nation. He and his family are estimable citizens and these two commissioners believed that the Cherokee Nation, while not willing to recommend his enrollment yet would not be averse to having him enrolled.

Respectfully,

FRANK PIERCE,
First Assistant Secretary.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, January 16, 1897.

The honorable the SECRETARY OF THE INTERIOR.

SIR: I have the honor to acknowledge the receipt, by your reference for consideration and report, of the report (with Cherokee Freedmen rolls, testimony taken and accompanying papers) of the Cherokee freedmen commission, under your appointment of February, 1896, and under office instructions prepared in this office and amended and approved by the department, dated April 23, 1896, in pursuance of a decree of the Court of Claims in the case of *Moses Whitmire, Trustee for the Freedmen of the Cherokee Nation* vs. *The Cherokee Nation and the United States*, No. 17209, authorizing the appointment of said commission, to proceed to the Cherokee country and hear the testimony both for and against the identity of all freedmen, free colored persons, and their descendants, claiming to be entitled to share in the distribution of $903,365.00 (adjudged by the court to be due said freedmen) that might be offered by the respective parties to the aforesaid suit, and to ascertain who of said persons on the Cherokee authenticated roll were alive and what descendants of said persons were alive on May 3, 1894.

In compliance with said reference, I have caused as thorough and as critical an examination to be made of said rolls, which were made a part of the report, as the limited time allowed for such examination would permit.

It appears that this commission was in session sixty-six days at various points in the Indian Territory, most convenient and approximate to said freedmen, having given an extended notice and the fullest publicity and opportunity to said freedmen to submit evidence in their own behalf.

This report is signed by all three of the commissioners, making it an unanimous report, and the opinion is expressed by them that said rolls include (practically) the names of every one that was entitled to citizenship in that country and to share in the distribution of said fund.

The total number of applicants before the commission is reported to have been about 5,770. The roll marked "Exhibit A," embracing 113 pages, purports to contain on the first 110 pages the names of 2,475 persons, to which are added, in the supplemental pages, 110a, 111a, and 112a, 56 additional names, numbered from 4358 to 4413, making in all 2,531 names of authenticated freedmen. On inspection I find the following numbers duplicated, viz, 226, 518, 789, 1396, 2029 to 2068 (40 names) and 2254, making 45 additional names; and the following five names interlined, with a half number, viz, 112½, 705½, 706½, 1201½, and 1358½, making a further addition of 50 numbers, or a total of 2,581 names; but I also find the following numbers omitted on said roll, viz, 251, 1631, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, and 2363, 12 names, which should be taken from the 2,581 names, making the true number in the aggregate on said authenticated roll *2,569 names.*

The roll marked "Exhibit B," embracing 80 pages, numbered from 111 to 190, inclusive, being the admitted or unauthenticated roll, purports to contain 1,882 names, numbered from 2476 to 4357, and a supplemental list of 33 names numbered from 4414 to 4443, including three half numbers, viz, 4416½, 4417½, 4418½, making in all 1,915 names. On inspection I find the following two numbers duplicated, viz, 3042 and 3175, and the following twelve half numbers interlined, viz, 2770½, 2771½, 2772½, 2773½, 2774½, 2775½, 2939½, 3009½, 3010½, 3011½, 3455½, and 3456½, making an addition of 14 names, or 1,929 names; but I also find the following 27 numbers are omitted, viz, 2871, 2872, 3098, 3426, 3427, 3428, 3429, 3430, 3431, 3432, 3433, 3434, 3435, 3606, 3960, 3966, 3975, 3976, 3977, 3978, 3979, 3980, 3981, 3982, 3983, 3984, and 4161, which should be taken from the 1,929 names, making the true number, in the aggregate on said admitted or unauthenticated roll, *1,902 names*, making the complete number on both authenticated and unauthenticated rolls *4,471.*

I find on the authenticated roll, "Exhibit A," a number of names which do not appear on the authenticated roll furnished by the Cherokee authorities to Special Agent J. W. Wallace, when he made his roll of Cherokee freedmen in 1889, which is on file in this office, and presumed to be the "authenticated roll" referred to in the decree of the Court of Claims in case No. 17209; but inasmuch as the persons represented on each roll have equal interests in the fund to be distributed, and the commission, by a unanimous vote, having determined that said persons were entitled to be enrolled as beneficiaries, I do not deem it necessary to transfer such names from the authenticated to the admitted or unauthenticated roll.

There is no evidence presented or statement made on said rolls showing that any of the persons on these rolls were the slaves or the descendants of slaves of Cherokee Indians, except as may be traced through the authenticated list furnished by the Cherokee Nation. I have therefore had said rolls compared with the "approved Wallace roll" of Cherokee freedmen, representing those living March 3, 1883, and whenever identification of names was

assured, have entered in pencil mark the "approved Wallace" number opposite such names. It will be seen that many of the names on the rolls prepared by this commission do not have any such pencil number opposite them; it should not be inferred therefrom that such names (of persons over 8 or 9 years of age) do not really appear on the "approved Wallace roll," but that the identification was not such as to justify the placing of the approved Wallace number opposite such name. It will also be observed that the sex and age of many of the persons whose names are represented on these rolls, notably the "admitted or unauthenticated roll" (Exhibit B), are not given, which renders the question of identification much more difficult of solution. The commission in its report invites attention to this fact, and states that the evidence presented to the commission was so conflicting that it did not undertake to give the ages in such cases. It would have been of valuable aid to the office and to whomsoever shall be detailed to make the payment of said fund had the commission noted approximately the age, and not left its determination to the office or the disbursing officer, who necessarily will not have the benefit of the evidence before the commission.

This office in the examination made has not undertaken to pass upon the "equities in the case" with any of those beneficiaries (further than to try to establish identification with the "approved Wallace roll") for the reason that no evidence was submitted by the commission in their behalf, but inasmuch as the commission was unanimous in placing these names on said rolls, it is taken for granted, in the absence of any adverse evidence, that all of said persons were beneficiaries of said fund.

The *roll of rejected claimants*, filed by the commission, aggregating 1,444 names, which includes those names that were erased in pencil by the commission before submitting its report to the department, is accompanied by the testimony taken in the several cases. This office has not had time to examine this mass of testimony, except that such cases as appear on the "approved Wallace roll" as rejected by the commission have been examined, and from this examination I am of the opinion that from the testimony submitted by the commission and the evidence before this office, such as the authenticated roll of Cherokee freedmen and the approved "Wallace roll," some persons whose names appear on the rejected roll are entitled to share in the distribution of the funds due the Cherokee freedmen.

I have caused to be prepared a supplemental list of persons whose names appear on said rejected roll, but believed by this office to be entitled to share in the distribution of the funds due the freedmen, and would respectfully recommend that it be approved by you. This list contains 144 names, from number 4444 to 4587, inclusive. I have also caused to be prepared, for your information, brief notes of the evidence in support of all the cases mentioned on this supplemental schedule, to which your attention is invited, and I would invite your especial attention to the following cases, viz:

Patsy Perryman, No. 4445, who is on the authenticated roll of Cherokee freedmen.

Sallie Cucumber, No. 4446, from evidence which appears to have been presented before Commissioner Wallace, was on the executive roll of freedmen.

Grant Chambers, No. 4447; Katie Kell, No. 4444; and Sophie Jones, No. 4448, who are descendants of persons on the authenticated roll. These persons come directly under the order of the court as entitled to enrollment, and they can not be rejected on other grounds.

John Tucker, No. 4559, does not appear to have been before Commissioner Wallace, but from the evidence, he and his family appear to have returned to the Cherokee Nation within the six months limit of the treaty of 1866; and while he might have been out of the country at different times since, for various periods, he is now in the Cherokee Nation and this office is informed has a good farm and is an industrious man. Under the decision of the Assistant Attorney General for the Interior Department, dated September 30, 1896, he is unquestionably entitled to enrollment.

Commissioners Clifton and Kern join in especially requesting the department to place upon the roll the name of Burrell Daniels, No. 4501, and his family. These commissioners state as follows:

"It was not in the power of the commission to do this because the evidence shows that he did not return until 1870 or later, but the evidence also shows that at the conclusion of the war he was sold by his owner, a Cherokee, into slavery in Mexico and kept there for five years, until by the interference of this Government, he was taken from Mexican slavery and at once returned to the Cherokee Nation. He and his family are estimable citizens, and these two commissioners believe that the Cherokee Nation, whilst not willing to recommend his enrollment, yet would not be adverse to having him enrolled."

The same question was raised in this case before Commissioner Wallace, and the facts as stated by these commissioners and as stated by Mr. Daniels himself in his testimony, submitted by them, are corroborative of the testimony as given before Commissioner Wallace, and upon which he was enrolled by the department. While under a literal interpretation of the language of the treaty he might not be entitled to enrollment, it was certainly not the spirit of the treaty to exclude persons of this class.

These commissioners also call especial attention to the case of George Bell, No. 4557, and of July Bell, No. 4558, whose cases are somewhat similar to that of Burrell Daniels.

Commissioner Kern states that the commission voted to place Cynthia McNair, No. 4551, and family on the roll, but they were inadvertently left off.

The other cases on this supplemental schedule are all on the approved "Wallace roll" and are believed by this office to be entitled to enrollment.

To determine whether or not there were any duplications of names on these rolls it became necessary to make an alphabetical index of said rolls.

A list of these seeming duplications were scheduled and submitted to Mr. Kern, one of the commissioners, now in this city, who from his knowledge of the facts and of said names as they appeared on said rolls was satisfied, in his review, that the following sixty-three names were undoubtedly duplications, viz:

No. 234, Lucy Whitmire, née Ross, a duplicate of No. 1965.
No. 2383, Alice Jones, a duplicate of No. 518a.
No. 2384, Oscar Jones, a duplicate of No. 518b.
No. 2385, Will Jones, a duplicate of No. 519.

No. 2378, Henry Melton, a duplicate of No. 579.
No. 2067a, Henry Sheppard, a duplicate of No. 955.
No. 1338, Nath. Dickson, a duplicate of No. 1137.
No. 1629, Addie Cornish, a duplicate of No. 1228.
No. 1537, Emanuel Wilson, a duplicate of No. 1254.
No. 1358½, Alex. Powell, a duplicate of No. 2468.
No. 1865, John Crossland, a duplicate of No. 1454.
No. 1863, Andrew Crossland, a duplicate of No. 1455.
No. 1649, Jane Ross, née Schrimsher, a duplicate of No. 1480.
No. 1625, Sarah Payne, née Glass, a duplicate of No. 1583.
No. 1785, Peter Baldridge, a duplicate of No. 1657.
No. 2029b, Lucinda Sheppard, a duplicate of No. 1674.
No. 2030b, Ellen Sheppard, a duplicate of No. 1910.
No. 1671, Mary Fields, a duplicate of No. 1776.
No. 2452, Sarah Nave or Watson, a duplicate of No. 1692.
No. 2315, Louis Riley, a duplicate of No. 1732.
No. 1871, Cynthia Cotton, née Foreman, a duplicate of No. 1812.
No. 2065, Florence Kates, a duplicate of No. 1832.
No. 1846, Lydia Irons, née Nave, a duplicate of No. 2451.
No. 1862, Sarah Nohl, née Roach, a duplicate of No. 1453.
No. 1040, Charlotte Brewer, née Harlin, a duplicate of No. 1889.
No. 1960, Johnson Murrell, a duplicate of No. 1850.
No. 1975, Will Evans, a duplicate of No. 2072.
No. 2158, John Fields, a duplicate of No. 1990.
No. 2000, Malinda Evans, a duplicate of No. 2079.
No. 2080, Sue Bird, nee Evans, a duplicate of No. 2001.
No. 2055a, Anthony Parris, a duplicate of No. 1883.
No. 2068a, Ruth Sheppard, now Chase, a duplicate of No. 2166.
No. 2111, Sarah Sanders, a duplicate of No. 2159.
No. 2112, Caroline Ross, née Sanders, a duplicate of No. 2160.
No. 2375, George Melton, a duplicate of No. 165.
No. 2525, Blue Thompson, a duplicate of No. 3854.
No. 2526, Bessie Thompson, a duplicate of No. 3855.
No. 2527, Ada Thompson, a duplicate of No. 3856.
No. 4033, Jess Vann, a duplicate of No. 3053.
No. 4034, Ellen Vann, a duplicate of No. 3054.
No. 4035, Mollie Vann, a duplicate of No. 3055.
No. 4036, Walter Vann, a duplicate of No. 3056.
No. 4037, Frankie Vann, a duplicate of No. 3057.
No. 4038, Riley Vann, a duplicate of No. 3058.
No. 4039, Levatt Vann, a duplicate of No. 3059.
No. 4040, Nettie Eaton, a duplicate of No. 3060.
No. 4013, Eddie Brown, a duplicate of No. 4005.
No. 4367, Lulu Brown, a duplicate of No. 1908.
No. 4363, Fannie Crossland, a duplicate of No. 1864.
No. 3829, Florence Hall, a duplicate of No. 4440.
No. 3830, Ned Hall, a duplicate of No. 4441.
No. 3831, Mary Hall, a duplicate of No. 4442.
No. 3832, Martha Hall, a duplicate of No. 4443.
No. 4424, Catharine Hester, a duplicate of No. 3814.
No. 4425, Lelia Hester, a duplicate of No. 3815.
No. 4426, Fleta Hester, a duplicate of No. 3816.
No. 4427, Mattie Hester, a duplicate of No. 3817.
No. 4428, John Hester, a duplicate of No. 3818.

No. 4429, Pearl Hester, a duplicate of No. 3819.
No. 4430, Marvin Hester, a duplicate of No. 3820.
No. 4088, Cynthia Johnson, a duplicate of No. 3252.
No. 1689, Pearl Lewis, a duplicate of No. 1070.
No. 1909, Sally Vann, nee Mayfield, a duplicate of No. 1244.

I therefore respectfully recommend that the aforesaid sixty-three names be erased or cancelled by drawing a red line through the names represented by the following numbers:

234, 1040, 1338, 1358½, 1537, 1625, 1629, 1649, 1671, 1689, 1785, 1846, 1862, 1863, 1865, 1871, 1909, 1960, 1975, 2000, 2029b, 2030b, 2055a, 2065a, 2067a, 2068a, 2080, 2111, 2112, 2158, 2315, 2375, 2378, 2383, 2384, 2385, 2452, 4363, 4367, on the authenticated roll, and 2525, 2526, 2527, 3829, 3830, 3831, 3832, 4013, 4033, 4034, 4035, 4036, 4037, 4038, 4039, 4040, 4088, 4424, 4425, 4426, 4427, 4428, 4429, and 4430 on the admitted roll, or that authority be given by you for their cancellation before your approval is given to said rolls.

There are many other possible duplications on said schedule on which Commissioner Kern declined to express a decisive opinion.

In view of the fact that should any names be erased and it was subsequently ascertained that the supposed duplications represented separate and distinct persons, the party whose name was erased would thereby be debarred from a participation in the distribution of the aforementioned fund, I have therefore hesitated about adding such names on the said list of duplications, but have noted the fact (in pencil) on said rolls, so that in making up the pay roll the fact may be noted that the officer disbursing said fund on said payroll might be placed on his guard and ascertain by personal inquiry whether or not these possible duplications exist in fact or represent separate and distinct persons.

This cancellation will reduce the number of names on the authenticated roll thirty-nine and the number on the admitted roll twenty-four, making the final number on authenticated roll 2,569, less 39=*2,530 names*, and on the admitted roll 1,902, less 24=1,878 names, and on the supplemental roll, taken from the rejected roll, *144 names*, making a grand total of the names on the three rolls *4,552*.

The several rolls are herewith respectfully submitted, with the recommendation that they be approved, as I am satisfied they are complete and as nearly accurate as it is possible for this office to make them within the limited time given for their examination.

The testimony submitted with these schedules is herewith respectfully returned.

Very respectfully, your obedient servant,

(Signed) D. M. BROWNING,
Commissioner.

CASE OF BURRELL DANIELS, ET AL.

DEPARTMENT OF THE INTERIOR,
Washington, February 28, 1907.

I. T. D. 5464–1907.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

SIR: There is inclosed a copy of the opinion of the Assistant Attorney General of February 27, 1907, approved the same day, in the mat-

ter of the application of Burrell Daniels et al. for enrollment as Cherokee freedmen.

In accordance with said opinion the application is denied.

The papers in the case have been transmitted to the Indian Office, with a copy hereof.

Respectfully,

JESSE E. WILSON,
Assistant Secretary.

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE ASSISTANT ATTORNEY GENERAL,
Washington, February 27, 1907.

I. T. D. 118–1906.

The SECRETARY OF THE INTERIOR.

SIR: You referred the papers relating to the application of Burrell Daniels *et al.* for enrollment as Cherokee freedmen for opinion concerning questions of law presented by the Commissioner to the Five Civilized Tribes.

This case has been under consideration at various times, and in opinion of May 9, 1905, it was recommended that the decision of the Commission to the Five Civilized Tribes adverse to applicants be vacated "and the case readjudicated under the removal or expatriation provision of the Cherokee constitution, with liberty on the part of either Daniels or the nation to introduce further evidence bearing upon the question of intention to change his domicile prior to his actual return to the nation." The case was returned to the Commissioner of the Five Civilized Tribes and further hearing was had. The facts developed are substantially that Daniels and other negroes, formerly slaves of Cherokees, at about the close of the Civil War were taken out of the Cherokee Nation and to Mexico, where they were held under the peonage law of that country until about 1872, when they were returned to this country. Daniels remained at San Antonio and other places in Texas until about 1884, when he returned to the Indian Territory. He claims that he was not before that time able to save enough to carry him to his former home, although it was always his desire and intention to so return. Upon his return he stopped at Muskogee, in the Creek Nation, and the date when he actually entered the Cherokee territory is not clearly shown.

The Commissioner of the Five Civilized Tribes held that Daniels was not entitled to enrollment. The Indian Office was of opinion that Daniels and others with him did not use diligence in returning to Indian Territory and are not entitled to enrollment.

The act of April 26, 1906 (34 Stat., 137), provides:

"The roll of Cherokee freedmen shall include only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendents, who were actual personal bona fide residents of the Cherokee Nation August eleventh, eighteen hundred and sixty-six; or who actually returned and established such residence in the Cherokee Nation on or before February eleventh, eighteen hundred and sixty-seven; but this provision shall not prevent the enrollment of any person who has heretofore made application to the Commission to the Five Civilized Tribes or its successor and has been adjudged entitled to enrollment by the Secretary of the Interior."

Upon the theory that Daniels' departure from the Cherokee Nation was not voluntary it might be held that notwithstanding his removal he still held a legal residence in the Nation. Evidently, something more than constructive legal residence was contemplated by the act of 1906. It had previously been held that one who had a constructive residence in the nation August 11, 1866, was within the terms of the treaty of July 11, 1866 (14 Stat., 801), which provided that freedmen and free colored persons "who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendents, shall have all the rights of native Cherokees." If it had been intended that this ruling should continue to control there would have been no necessity for further legislation on the subject. The only possible conclusion is that it was intended by the act of 1906 to change existing law as construed and to provide some different and stricter rule to guide in the enrollment of Cherokee freedmen. Evidently, it was intended to require something more than constructive residence. Under the new rule one, to entitle himself to enrollment as a Cherokee freedman, must show that he was actually not constructively residing in the nation August 11, 1866, or that he returned and established in person an actual residence within six months from the date or that he is a descendant of some person who had met these requirements. When this rule is applied to the applicants it seems clear that they can not be enrolled in spite of any equities they may have in the premises.

Nor are they saved by the qualifying clause. While they have met the condition of having made application they have not been adjudged entitled to enrollment by the Secretary of the Interior.

I am of opinion, and so advise you, that the provision of the act approved April 26, 1906, prevents the enrollment of these applicants.

The papers are herewith.

Very respectfully,

FRANK L. CAMPBELL,
Assistant Attorney General.

Approved, February 27, 1907.

E. A. HITCHCOCK, *Secretary.*

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES.
Muskogee, Indian Territory, October 18, 1905.

The honorable the SECRETARY OF THE INTERIOR.

SIR: On September 25, 1905, there was transmitted to the department the record of proceedings had in the consolidated case of Burrell Daniels et al., Cherokee freedman R. 40 et al., wherein, in its decision rendered on said date, this office found that the said Burrell Daniels et al. possessed no rights to Cherokee freedman citizenship. Said letter set forth the views of this office relative to the law applicable in determining the rights of said applicants to enrollment as Cherokee freedmen.

I now have the honor to direct your attention to certain proceedings had before the Court of Claims in the case of *Charles Journeycake et al.* v. *The Cherokee Nation et al.* (31 C. of Cls., 40), and which are considered pertinent to the position taken by this office and material in determining the rights to Cherokee citizenship of the above-indicated applicants.

"Charles Journeycake, principal chief, *v.* The Cherokee Nation et al. Johnson Blackfeather, principal chief, *v.* the same. Moses Whitmire, trustee, *v.* the same.

"(Nos. 16837, 16857, 17209. Decided January 27, 1896.)

"ON COMPLAINANTS' MOTIONS.

* * * * * * *

"V. The treaty with the Cherokee Nation, 19th July, 1866 (14 Stat. L., p. 799, Art. IX), provides that the freedmen of the nation who 'are now residents therein, or who may return within six months, and their descendants' shall be entitled to dwell and occupy land in the Cherokee country. This was intended for the protection of the Cherokee Nation. That is to say, freedmen and the descendants of freedmen who did not return within six months are excluded from the benefits of the treaty and of the decree."

"The reporters' statement of the case:

"The grounds upon which the motions were based will be found set forth in the opinion of the court. After the decision upon these motions had been announced, the counsel for the complainants in the freedmen's case requested that certain instructions be given to the Secretary of the Interior in regard to the payment of the fund. These the court referred to the Secretary for his consideration. Subsequently the court was informed that the Commissioner of Indian Affairs desired the instructions of the court as to how he should proceed under the decree in determining who were the resident freedmen entitled to share in the distribution of the fund. The court accordingly addressed to him the communication of February 18, 1896, which follows the opinion." * * *

"COURT OF CLAIMS,
" *Washington, February 18, 1896.*

"Hon. DANIEL M. BROWNING,
" *Commissioner of Indian Affairs.*

"SIR: The court is informed that the Commissioner of Indian Affairs desires its opinion in regard to the fifth of the proposed instructions referred for the consideration of the Secretary of the Interior February 15, 1896.

"The decree in this case follows and refers to Article IX of the treaty with the Cherokee Nation, July 19, 1866, and the persons therein designated are the complainants in this case entitled to payment under the decree.

SYLLABUS.

"The court is of the opinion that the clauses in that article in these words, 'And are now residents therein, or who may return within six months, and their descendants,' were intended, for the protection of the Cherokee Nation, as a limitation upon the number of persons who might avail themselves of the provisions of the treaty; and consequently that they refer to both the freedmen and the free colored persons previously named in the article—that is to say, freedmen and the descendants of freedmen who did not return within six months are excluded from the benefits of the treaty and of the decree.

"The court is also of the opinion that this period of six months extends from the date of the promulgation of the treaty, August 11, 1866, and consequently did not expire until February 11, 1867.

"WM. A. RICHARDSON,
"Chief Justice."

The foregoing is a part of the proceedings had in the case of *Moses Whitmire, trustee, etc.*, v. *The Cherokee Nation et al.*, and is the interpretation of the Court of Claims placed upon its decree in said Whitmire case, rendered on February 3, 1896, hence, in legal effect, is a part of said decree.

Paragraph II, section 21, of an act of Congress approved June 28, 1898 (30 Stat., 495), provides:

"It (the commission) shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six."

Said Paragraph II, above quoted, is the jurisdictional act under which this office is making a roll of Cherokee freedmen, and it is respectfully submitted that in view of the foregoing neither this office nor the department has authority to grant the application for the enrollment as a Cherokee freedman of anyone who can not show that he, or, in case of one who claims as a descendant, that the ancestor through whom he obtains his right to Cherokee freedman citizenship, was actually residing in the Cherokee Nation on August 11, 1866, or established a residence in said nation within six months thereafter.

It is respectfully requested that this letter be made supplemental to and considered as a part of the record in the proceedings had in the case of Burrell Daniels et al., applicants for enrollment as Cherokee freedmen.

Respectfully, TAMS BIXBY, *Commissioner.*

(Through the Commissioner of Indian Affairs.)

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

The honorable the SECRETARY OF THE INTERIOR.

SIR: Receipt is hereby acknowledged of departmental letter of May 13, 1905 (I. T. D., 5330, 1905), remanding the record, including the decision of the Commission to the Five Civilized Tribes of January 18, 1904, in the matter of the applications of Burrell Daniels et al. for enrollment as Cherokee freedmen, for rehearing and readjudication in accordance with the opinion of the Assistant Attorney General, rendered on May 9, 1905, wherein it is held that the commission erred in adjudicating the rights to enrollment as Cherokee freedmen of the said Burrell Daniels et al. under the theory that their rights were barred under Article IX of the treaty of 1866, and that said applicants' rights to enrollment as Cherokee freedmen should have been adjudicated under the provisions of section 2, Article I, of the Cherokee constitution, which, in part, provides:

"Whenever any citizen shall remove with his effects out of the limits of this nation and becomes a citizen of any other government,

all his rights and privileges as a citizen of this nation shall cease; * * *."

In accordance with said instructions, these applications were set down for rehearing before the commission on June 8, 1905, and due notice of said rehearing was sent to all parties in interest.

On the date set for rehearing all parties applicant appeared either in person or by attorney; the Cherokee Nation appeared by attorney; and a rehearing was had therein and the applications again taken under advisement by the commission.

There is herewith transmitted the record in said cause, together with my opinion of this date, for further consideration by the department.

In transmitting this record, I desire to submit my views on the questions of law and fact arising in the adjudication of said applications more fully than they are set forth in the judgment in this cause.

The following statement of facts is fully supported by the evidence in this case:

That Burrell, Miranda, and Tom Daniels, principal applicants, and Nancy Newton, née Daniels, deceased, through whom all the other applicants herein claim the right to enrollment as Cherokee freedmen, were, at the commencement of the rebellion, the slaves of Cherokee citizens; that sometime during the summer or fall of 1862 said Burrell, Miranda, and Tom Daniels, and Nancy Newton, née Daniels, deceased, were removed from the Cherokee Nation by one Joel M. Bryant, and after the close of the rebellion were taken by the said Joel M. Bryant to Mexico, where they remained until sometime during the early 70s, when they removed to San Antonio, Texas, and a number of years later removed from Texas to the Indian Territory.

The principal applicants herein allege that they were forced by Joel M. Bryant (after the rebellion) to make the trip to Mexico; that after arriving in Mexico they were sold into peonage and compelled to remain in that country six or seven years; that upon their release from peonage in Mexico they removed to Texas, where, by reason of the condition of their finances, they were forced to remain a number of years in order to earn money enough to pay their way to the Cherokee Nation, and that since the close of the rebellion it was ever their intention to return to said nation as soon as circumstances would permit. These allegations were denied by the Cherokee Nation.

Under this showing attorneys for applicants contend that said applicants have complied with the provisions of Article IX of the treaty of 1866, which in part provides:

"That all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees."

Numerous letters and briefs have been filed in this case by the attorneys for applicants in support of, among others, their contention above indicated. This office refers and calls particular attention to certain parts of said letters and briefs material to the question now under discussion. In this connection is cited the frequent use by attorneys for applicants of the term "poor ignorant people" as designating claimants generally for freedmen citizenship in the Cherokee

Nation. Aside from the fact that ignorance does not excuse them from compliance with the law, this office advisedly says that the term is a misnomer, and after several years' experience with this class of applicants it is convinced that they are as fully capable of protecting their own interests as are the Indian citizens of the Cherokee Nation. And the applicants in this case are anything but exceptions to their class.

Several reasons are advanced by their attorneys why said principal applicants should not be required to show that they returned to the Cherokee Nation, after the rebellion, within the time stipulated in said Article IX of the treaty of 1866, as interpreted in the decree of the Court of Claims rendered on February 3, 1896, in the case of *Moses Whitmire, Trustee, etc.*, vs. *the Cherokee Nation et al.*, but, except the one below discussed, all have been disposed of by the Assistant Attorney General, in his opinion above referred to.

After asserting that "A slave can have no domicile, inasmuch as he cannot possess one of the requisites, namely, intention:" that "A slave had no political rights (92 U. S., 27)," and that "Domicile is a political right," they argue as follows:

"In the United States a slave was capable of committing crime, of receiving his freedom; of being the subject of homicide, and of modifying, by his volition, very materially, the rules applicable to other species of property. While, under the civil law, slaves were classed among things, and as such, a slave was not considered capable of violating the criminal or civil laws of the country, any more than other domestic animals.

"The modifications placed upon the old civil law theory, were the results, largely, of statutory enactments, since genuine slavery was not known under the original common law. The villiens of the early English times were but feudal tenants of the lowest grade, and were but monuments of Danish tyranny."

From this line of argument they drew the conclusion that:

"On account of the above-named conditions, a slave, emancipated in the United States, acquired the domicile of his owner by operation of law, in the same manner that an infant acquired the domicile of its ancestor by inheritance." (Brief filed with the department, December 12, 1904.)

And again, "When by act of the national council in February, 1863, the shackles fell from all Cherokee slaves, this petitioner became a freedman, and acquired a right of domicile in some place. From the very nature of the circumstances he must have become vested with the same domicile as his master." (Paragraph 1, page 20, brief filed with the department, May 6, 1905.)

This office is free to admit its inability to follow the reasoning of the attorneys for the applicants in the extracts from their briefs above set out, but the conclusion reached it can fully understand, and as they cite no authority to sustain their position it is considered that their conclusion is subject to serious doubt, if not complete rebuttal.

Following the reasoning of attorneys for applicants in th case, the Assistant Attorney General says:

"At the time of emancipation of the slaves by the Cherokee Nation, February, 1863, referred to by Article IX of the treaty (14 Stat., 801), the slave became a free man, and the right of choice of domicile arose

to him. Under undisturbed conditions the presumption would arise of his domicile at his place of actual residence. The record, however, shows that at the close of the War of the Rebellion, Daniels was, with some others, in actual servitude. Conditions were not undisturbed. He had been put by his master under control of insurgent military authority. When the war ceased, some of these insurgent organizations or bands went to Mexico, carrying Daniels with them and sold him to Mexicans, where he was held in peonage until his return was effected by intervention of the United States." (Page 6, Asst. Atty. Gen'l's Opinion.)

"To that time Daniels had been able to do nothing, and had done nothing, to change his legal domicile from the nation. He had been forcibly and tortiously deported by brigands and sold into servitude. No rights could be lost thereby. In legal aspect he was while in oreign peonage an actual resident of the Cherokee Nation and citizen hereof under Article IX of the treaty. If upon being freed from hysical restraint he returned to his home in the nation within such ime as was reasonably necessary, considering his means and circumstances and the facilities for travel he should be regarded as never naving been absent from the nation. If, on the other hand, he pursued such a course as showed an intent to choose a domicile and abide there, his rights should be determined precisely as those of a native-born Cherokee citizen would be who at that time removed from the nation and took up his residence at San Antonio." (Page 8, Asst. Atty. Gen'l's Opinion.)

It is well settled that prior to the rebellion an African, whether slave or free, had no civil, social, or political rights or capacities whatsoever, except those conferred by statute. And "every attempt to extend to a slave positive rights was an attempt to reconcile inherent contradictions, for, in the very nature of the case, he was subject to despotism. Law, as to him, was only a contract between his rulers." (*Bryan* v. *Watson*, 20 Ga., 480; *ex parte Boylston*, 2 Strob. (S. Car., 41); *Dave* v. *State*, 22 Ala., 33; *Oliver* v. *State*, 39 Miss., 527; *Jacobs* v. *State*, 3 Humph. (Tenn.), 493; *Macon* v. *State*, 4 Humph. (Tenn.), 421.) "He was mere property, and in the United States the right of property in a slave was recognized not only in the Constitution, but by every department of the Government, from its foundation to the commencement of the rebellion. The institution was regarded as beyond all cavil entitled to the benefits of all the provisions and guarantees for the protection of any other property." (*Prigg* v. *Com.*, 16 Pt. (U. S.), 539; *Dred Scott* v. *Sanford*, 19 Howard (U. S.), 393; *Neal* v. *Harmer*, 9 Ga., 555; *Bodine's Will*, 4 Dana (Ky.), 476; *Corbin* v. *Marsh*, 2 Duv. (Ky.), 193; *Thornton* v. *De Moss*, 5 Sned. & M. (Miss.), 609; *Hendelite* v. *Thurman*, 22 Grat. (Va.), 466, 12 Am. Rep. 526.)

In view of the foregoing it is quite apparent that any civil, social, or political rights African slaves enjoyed in this country prior to the rebellion must have been conferred upon them by statute, and in the absence of any showing that by statutory enactment slaves were granted the right to acquire a domicile by inheritance, or otherwise, or that said domicile was to be that of their masters, it is not unreasonable to presume that such right did not exist, and that to ascertain the domicile of a slave since freed the same rules of law are applicable as are applicable to any other free person.

Accepting, for the sake of argument, February 18, 1863, as the date upon which Burrell and Miranda Daniels obtained their freedom (which, however, is error, as at that time said principal applicants were without the jurisdiction of the Cherokee Nation, and, under the law and as a matter of fact, were not free prior to the close of the war), it is considered that any political rights now possessed by them must have been conferred upon them on or subsequent to said date, and as the right of domicile is a political right, their domicile at any time since being freed should be determined in accordance with the law applicable to persons sui juris.

In connection with the foregoing attention is respectfully called to the following authorities, which clearly define the requirements necessary for an adult to establish a legal domicile:

"To acquire a domicile two things *must concur:* (1) A residence; (2) an intention to make it the home of the party." (*Hart v. Lindsey* (17 N. H., 235), 43 Am. Dec., 597.)

"Residence and intention to remain *must both concur* in order to establish domicile." (*Gilman* v. *Gilman* (52 Mr., 165), 83 Am. Dec., 502; *Gavillion* v. *Richard* (13 La., 293), 33 Am. Dec., 563.)

"To acquire domicile there *must* be a residence in a place and an intention to make it one's home." (*Viles* v. *City of Waltham* (157 Mass., 542), 34 Am., State reports, 311.)

"Domicile can only be acquired by the fact of bodily presence, coupled with the requisite animus." (Jacobs Law of Domicile, sec. 93, page 150.)

"A new domicile is not acquired by mere intention to so acquire it, without the fact of an actual removal, nor is it acquired by a removal without the intention." (*Ringgold* v. *Barley* (5 Md., 186), 59 Am. Dec., 107.)

"Intention to reside must relate to the future and not to the past, where it, combined with residence, is relied upon to establish a domicile." (*Gilman* v. *Gilman*, supra.)

Numerous authorities to the same effect could be collected, but it is considered that the foregoing citations are sufficient to show that two things must concur in order to establish a legal domicile: (1) Bodily presence, and (2) an intention to make it the home of the party. If either requisite be lacking, or they are not coincident, no domicile is established.

Applying the law of domicile to the facts established by the evidence in the case now under consideration, it will be found that prior to 1884, if then, one or the other of these elements necessary to establish their domicile in the Cherokee Nation was ever lacking on the part of the applicants. Prior to February 18, 1863, when the principal applicants were bodily present in the Cherokee Nation, they had not the legal capacity to possess one of the requisites, namely, intention, and in so far as this office is able to discover, after a somewhat exhaustive research, there is no law, custom, or judicial decision to the effect that this intention could have been supplied or exercised by any one for them.

Subsequent to said last above-mentioned date, and prior to 1884, while they may have possessed, during all this time, the legal capacity to choose a domicile, the fact remains that they were not bodily present in the Cherokee Nation during said interval; consequently, said

applicants did not, and as a matter of law could not, establish a domicile in said nation until they were not only bodily present but legally capable of intending to make that nation their home, which requisites, as the evidence shows, did not concur prior to the year 1884. Hence, under the law, they did not comply with the provisions of Article IX of the treaty of 1866, relative to establishing a residence in the Cherokee Nation.

On May 22, 1904, the Assistant Attorney General, in reply to certain questions submitted to him by the attorneys for the Cherokee Nation, held that—

"The period of six months fixed by the treaty is not a limitation upon a right, but a condition qualifying a right given or created by the treaty. It is not in the nature of a condition precedent but essentially part of the facts out of which the right given arises. There is no right independent of the condition imposed. Such limitation affects all alike, competent or incompetent.

"Residence is a word of varied meaning, incapable of accurate definition without reference to the context in which it appears. It is used with equal propriety in the sense of a legal domicile and in that of a temporary place of abode. The context shows that the object of the provision (Article IX, treaty of 1866) was to give the status of citizenship in the Cherokee Nation to classes of persons who before did not have it, many of whom had lately been mere chattels. Its purpose was to raise persons of inferior or no civil status to that of dignity and of legal equality with the body of citizens.

"I am of opinion that physical return of the person within the time prescribed by the treaty was not necessary in those cases where a *domicile theretofore held* in the Cherokee Nation had not been abandoned or lost, and that the person might be excused from return by inability or like reasons as prevent loss of domicile by one not actually resident at the place of *legal domicile*."

This ruling was followed by the commission in numerous decisions since rendered, and it was ever its understanding that it was incumbent upon freedmen claimants to show that during the interval between the time of obtaining their freedom and February 11, 1867, they, or the ancestor through whom they claim their right, had established a legal domicile in the Cherokee Nation. The question of facilities for travel, financial conditions, distance applicant was removed from the Cherokee Nation, size of his family, and a great many other hindering causes that applicants may now plead, if the new ruling in this case is permitted to stand, were never gone into, but applicant's rights have ever been determined upon, among others, the clear-cut proposition, Were you or those through whom you claim the right to enrollment as a Cherokee freedman actually present in the Cherokee Nation with the intention of establishing a residence therein during the interval between the date of being freed and February 11, 1867? And it is but fair to the Cherokee Nation that this should be the extent of the inquiry along this line.

The Cherokee Nation is not responsible for the existence of conditions that prevented the freedmen from complying with the treaty stipulations of 1866; and, further, if freedmen claimants are permitted to plead the many reasons suggested by the new ruling in this

case as excuses for their noncompliance with said treaty stipulations, the nation is at the mercy of the freedman applicant, for not only are the majority of these reasons matters peculiarly within the knowledge of the applicant, but, if alleged, as undoubtedly they will be, are at this late date incapable of being rebutted.

Furthermore, this ruling in effect removes from Article IX of the treaty of 1866 the time limit within which freedmen were required to establish their residence in the Cherokee Nation. If the said act of February 18, 1863, ipso facto, made absent freedmen domiciled citizens of the Cherokee Nation, what object can there be for investigating the question as to when freedmen applicants or their ancestors returned to the Cherokee Nation and established their residence therein after the rebellion, when the only advantage to be obtained by complying with this provision was to secure a political right which under the ruling in this case was already theirs?

Under this ruling the only question for investigation and determination would be: Has there been a forfeiture of the rights absolutely conferred by the treaty of 1866 upon those who were the slaves of Cherokee citizens, or free colored persons residing in the Cherokee country at the commencement of the rebellion, and their descendants?

It is for these reasons—

(1) The ruling of the department is not in accordance with the law; and

(2) To follow said ruling to its logical conclusion will necessitate the reopening of numerous cases heretofore passed upon by the Commission to the Five Civilized Tribes and the department and the adoption of an entirely new construction of the law applicable to Cherokee freedman cases—

that this office respectfully requests that the ruling in this case be reconsidered and the former decisions of the department in this class of cases be adhered to.

It is, however, considered by this office that even though Burrell and Miranda Daniels and family were domiciled citizens of the Cherokee Nation on or prior to February 11, 1867, they subsequently forfeited their Cherokee citizenship, under the provisions of Section II, Article I, of the Cherokee constitution, and in this connection attention is called to the following points in this case:

The evidence in this case does not show that Joel M. Bryant refused to turn in his equipage at the close of the rebellion, or that he was at the head of an "insurgent band," or that he or any one of his company ever stole a bovine in their lives; neither does the evidence show that either or any of them compelled any red, white, or black man, woman, or child to accompany them to Mexico in 1865, or at any other time. All such allegations are based upon the unsupported and uncorroborated testimony of Burrell Daniels.

In re testimony of Burrell Daniels: This applicant seems to have had a wonderful knowledge of his former master's business—at a time, too, when he would have it believed that his ex-master was engaged in a transaction that required secrecy. He is perfectly familiar with the motive that prompted Joel Bryant to go to Mexico, and testifies positively that Col. Bryant sent certain members of his party—giving their names—from west Texas to east Texas to steal cattle; and that after a short absence they returned with 1,500 head,

which they took across into Mexico. He further testifies that he never could read or write, but that he, with others, was compelled at the point of a gun to enter into a contract whereby they agreed to pay Col. Bryant for their transportation from Texas to Mexico. All of which is denied, and the contrary alleged, by two witnesses for the Cherokee Nation, who were members of Col. Bryant's party from Texas to Mexico in 1865.

Attention is further called to the testimony of Burrell Daniels relative to his return from Mexico to Texas. On his first appearance before the commission he testified that he and his family were released from peonage in Mexico through the intervention of President Grant, and that they were brought from Chihuahua to the Rio Grande by soldiers sent into Mexico to effect their release; that the soldiers paid him $20.00 for services rendered during the trip, and that he and his family immediately thereafter started for San Antonio. On his last appearance before the commission he omitted the soldier feature of his release and return, and testified that he effected the release of himself and family in Mexico by laboring until the amount for which he was held was satisfied; that he, leaving his family at Chihuahua, together with Mr. Brown, a lumberman, followed a train of wagons from Chihuahua to the Rio Grande River, where he worked in a mill for ten months, during which time he sent money to his family in Mexico for their support; that finally he arranged with a man in charge of a Mexican wagon train to bring his family to him, the consideration being $15.00, and that after their arrival he and his family remained on the Rio Grande River for a while, or until he arranged with the boss of another wagon train to transport himself and family to San Antonio, and that on their arrival at the latter place, instead of charging him anything for transportation, the man in charge of the train paid him $10.00 for services rendered during the trip.

In view of the many unreasonable and improbable assertions made by the applicant, Burrell Daniels, relative to matters that he could have known only by hearsay, or by drafts upon a rather vivid imagination, of which he seems possessed, in connection with the many contradictory statements made by him, it is considered that his testimony is of little value in ascertaining the facts at issue in his case, and that his acts, in connection with certain facts known to this office, will better serve as a guide in determining whether or not it was his intention, after the rebellion, to return to the Cherokee Nation as soon as circumstances would permit.

Burrell Daniels testifies that he knew nothing of the treaty of 1866 prior to his removal to the Cherokee Nation in 1884, hence it cannot be inferred that during the interval between July 19, 1866, and the date of his removal to said nation it was ever his intention to comply with its provisions.

The testimony of Burrell Daniels as to dates and places of birth of his children, records of their marriages, and other attendant circumstances, shows that he and his family lived at least twelve years in Texas; but, after the most thorough examination, this applicant will account for but five and one-half years spent in that State, which, on its face, shows an inclination to keep back facts that would tend to show whether or not he intended to make Texas his home.

It is urged by the attorneys for applicants as a reason for Daniels' and his family's failure to return to the Cherokee Nation at an earlier date, that their stay in Texas was at a time when no railroads had penetrated those regions (Weimar and San Antonio, Texas) or afforded facilities for travel. This is but a quotation from the Assistant Attorney General's opinion rendered on May 9, 1905, wherein he says:

"He (Burrell Daniels) was not returned, however, to his home in the nation, but was left in San Antonio in Texas, about seven hundred miles from the Cherokee country, when no railroads had penetrated those regions or afforded facilities for travel."

It is a matter of public knowledge that the Missouri, Kansas and Texas Railway was built through the Indian Territory to Denison, Texas, during the years 1871 and 1872, and it is known to this office that this line passes through the Cherokee Nation within ten miles of Burrell Daniels' old home on Grand River.

"In 1850 General Sidney Sherman organized, in Boston, Mass., a company for the building of a railroad in Texas. In 1852 the Buffalo Bayou, Brazoz & Colorado road was begun, and the shrill whistle of the engine was heard at Harrisburg. The road in 1859 had reached the Colorado River, only sixty-five miles from its starting point. This was the beginning of the great line now known as the 'Sunset Route' (Southern Pacific)." (A new history of Texas, revised ed., page 332.) (This is the railroad on which Burrell Daniels and his family traveled from San Antonio to Weimar shortly after their removal from Mexico to Texas.)

"In 1848 a charter was granted to the Houston & Texas Central; work was not begun till 1853, and in 1861 not more than eighty miles had been completed. Twelve years later the road reached Denison and became a mighty thoroughfare of traffic.

"Even as late as 1867 the railroads in Texas were few in number and limited in extent, the total mileage amounting to not more than four hundred miles. From 1873 to 1890 there was a wonderful increase; roads sprang up in all directions, new sections were opened and rapidly settled, everywhere the iron horse carried civilization, comforts, and luxuries." (Ib.)

Thus it will be seen that as early as 1873 there was a direct all-rail route from that part of Texas (Weimar and San Antonio) where the Daniels were located to within a few miles of their old home in the Cherokee Nation. This, it is believed, fully settles any question as to the railroad facilities between the Cherokee Nation and San Antonio, Texas, and successfully rebuts any allegations to the effect that such facilities were inadequate.

It is contended in behalf of applicants that while Daniels and his family were living in Texas, they were the "victims of the vicious system of share farming," and that this must be considered as one of the attendant circumstances which prevented them from returning to the Cherokee Nation at an earlier date. Burrell Daniels testified that he raised four crops in Texas. The first year he came out in debt. The second year he left the place after the crop was put in. The third year he came out even, and the fourth year he made enough out of the crop to pay up "all our debts and everything and we had enough money to come to Muskogee." This is the extent of their farming in Texas, so far as the record shows, and it does not

indicate that they were the victims, for any length of time, at least, of the so-called "vicious system of share farming," alleged to be at that time prevalent throughout the South.

Another feature established by the evidence in this case, and worthy of comment, is this: The testimony of Burrell Daniels shows that, starting from Chihuahua, Mexico, with no financial means, and traveling only by wagon train, the distance between Chihuahua and San Antonia, Texas, 520 miles, was covered by himself and family within a few months, but to cover the distance between San Antonio, Texas, and Muskogee, Indian Territory, 568 miles overland, or 703 miles by rail, required twelve years for himself and a part of his family to make the trip, and for other members of his family it required twenty-four years to reach the Cherokee Nation.

Attention is also called to the fact that the evidence in this case shows that Burrell Daniels and those who returned with him to the Territory after the rebellion did not settle in the Cherokee Nation, but rather in the Creek Nation, where, as indicated by the Wallace roll (1889), Cherokee census roll of 1893, and Kern-Clifton roll (1896), they resided continuously for twelve or thirteen years.

The foregoing, it is respectfully recommended, shows conclusively that neither Burrell Daniels, nor any member of his family returned to the Cherokee Nation after the rebellion as soon as circumstances would permit, but rather that the return of part of this family to the Indian Territory nineteen years after the close of the rebellion and the return of other members of said family thirty-two years after the war, was due to some cause other than a desire or an intention to save or acquire any citizenship rights in the Cherokee Nation.

This cause is discussed thus in detail because of its great importance to the work of enrollment of the Cherokee freedmen. This work is at the present time almost completed. It has been attended by many difficulties, caused principally by the reason that the facts to be established occurred thirty-five or more years ago, which lapse of time necessarily dims and clouds the memory of the witnesses.

The great bulk of this work was done under precedents and an interpretation of the law entirely at variance with the opinion of the Assistant Attorney General of May 9, 1905, rendered in this cause, and the confusion which would result from a change at this late date can not be overestimated.

Already many motions to reopen and reconsider, in the light of this ruling, cases long since closed have been filed, and many other applicants are only waiting for final decision in this case along the lines laid down in the opinion of the Assistant Attorney General, supra, to pray for a reconsideration of their cases.

It is therefore respectfully recommended that this matter be again carefully considered in the light of the views herein set forth and that my decision in this case, herewith transmitted, be affirmed.

Respectfully,

(Signed) TAMS BIXBY,
Commissioner.

(Through the Commissioner of Indian Affairs.)

Department of the Interior, Commissioner to the Five Civilized Tribes.

In the matter of the application for the enrollment of Burrell Daniels et al. as Cherokee freedmen, consolidating the applications of Burrell Daniels et al., Cherokee freedman R 40; Thomas Daniels et al., Cherokee freedman R 391; Andrew Daniels et al., Cherokee freedman R 395; Burrell H. Daniels, Cherokee freedman R 390; Lizzie Haynes et al., Cherokee freedman R 393; Mack Daniels et al., Cherokee freedman R 392; Mary Hill et al., Cherokee freedman R 394; Lizzie Shafer et al., Cherokee freedman R 396.

DECISION.

The record in this case shows: That applications for enrollment as Cherokee freedmen were made to the Commission to the Five Civilized Tribes by Burrell Daniels for himself, his wife, Miranda Daniels, and minor son, Robert Daniels; by Thomas Daniels for himself and minor children, Mary and Louella Daniels, and minor grandchild, Julia Daniels; by Andrew Daniels for himself and minor children, Willie, Lewis, Susie, Thomas, Burley, Essie, Minnie, Miranda, and Ruth Daniels; by Burrell H. Daniels for himself; by Lizzie Haynes for herself and minor child, Edward Haynes. Thereafter, on May 12, 1902, there was filed with the commission an affidavit showing the birth, on January 29, 1902, of Amos Haynes, child of the applicant, Lizzie Haynes; by Mack Daniels for himself and minor child, Mady Daniels; by Mary Hill for herself and minor child, Alice Hill. Thereafter, on May 12, 1902, there was filed with the commission an affidavit showing the birth on March 10, 1902, of Adran Hill, daughter of the applicant, Mary Hill, and by Lizzie Shafer for herself. Thereafter on June 4, 1902, there was filed with the commission an affidavit showing the birth, on May 1, 1902, of Arlena Shafer, daughter of the applicant. Lizzie Shafer.

The record further shows: That on January 18, 1904, the commission rendered its decision herein, denying said applicants the right to enrollment as Cherokee freedmen; that on June 24, 1904 (departmental letter I. T. D. 5040–04), said decision of the commission was affirmed by the department; and that, thereafter, on December 12, 1904, a motion for review was filed with the department, on behalf of the applicants in this case, the same being submitted to the Assistant Attorney General for his opinion thereon; that, on May 13, 1905 (departmental letter I. T. D. 5330–05), the department, in accordance with opinion of the Assistant Attorney General, rendered May 9, 1905, rescinded its decision of June 24, 1904, and returned the record in this case with instructions to "institute a rehearing in the matter"; and that, on June 8, 1905, further proceedings in the matter of said application were had before the commission at Muskogee, Indian Territory.

The evidence in this case shows: That all the applicants herein claim the right to enrollment as Cherokee freedmen.

The following points in this case are fully established by the evidence, no attempt having been made to disprove them.

(1) That the applicants, Burrell and Miranda Daniels, are the parents of Robert, Thomas, Andrew, Burrell H., and Mack Daniels, and Liz-

zie Haynes, née Daniels, and Nancy Newton, née Daniels, deceased; and that all the other applicants herein are descendants of certain of the above-named persons, and possess no rights to enrollment as Cherokee freedmen other than as such descendants.

(2) That the applicants, Burrell, Miranda, and Thomas Daniels, and Nancy Newton, née Daniels, deceased, were the slaves of Cherokee citizens at the commencement of the rebellion, and that, after the close of said rebellion, the three applicants first above mentioned returned to the Indian Territory during the following years: Burrell and Miranda Daniels in 1884, and Thomas Daniels in 1897. The said Nancy Newton, née Daniels, deceased, never returned to the Indian Territory after the rebellion, she having died in Texas prior to the year 1884.

(3) That all the applicants herein except Burrell, Miranda, and Thomas Daniels were born since the commencement of the rebellion.

(4) That those applicants herein who were in being at the close of the rebellion, together with the said Nancy Newton, née Daniels, deceased, were taken, by one Joel M. Bryant, from Texas to Mexico during the year 1865, where the said Burrell Daniels and his family remained until about the year 1872, when they removed to Texas and continuously lived therein till their return to the Indian Territory as above indicated.

The evidence in this case further shows: That the applicants, Burrell and Miranda Daniels, with their family, voluntarily accompanied Joel M. Bryant and party from Texas to Mexico during the spring and summer of 1865; that they remained in Mexico till 1872, when they removed to Texas, became domiciled citizens of that State, and continuously lived therein till their removal to the Indian Territory during the years 1884 and 1897, and that none of the applicants herein have ever been admitted or readmitted to citizenship in the Cherokee Nation.

And it is further considered that the evidence in this case shows that upon their return to the Indian Territory, after the rebellion, neither the applicants, Burrell, Miranda, and Thomas Daniels, nor the applicants herein claiming through them, nor those claiming through Nancy Newton, née Daniels, deceased, established a residence in the Cherokee Nation, but rather in the Creek Nation, where they continuously resided till subsequent to the year 1896.

None of the applicants herein, nor any ancestor through whom by any possibility they might obtain rights to Cherokee freedmen citizenship, can be identified on the Cherokee authenticated tribal roll of 1880, or the Cherokee census roll of 1896.

Findings of fact and conclusion: It is considered that the evidence in this case shows that neither of the applicants, Burrell, Miranda, or Thomas Daniels, nor Nancy Newton, née Daniels, deceased, became domiciled citizens of the Cherokee Nation within the time specified by the decree of the Court of Claims rendered on February 3, 1896, in the case of *Moses Whitmire, Trustee, etc.*, vs. *The Cherokee Nation et al.*, for the return of freedmen to the Cherokee Nation; that all the other applicants herein were born since the commencement of the rebellion, are descendants of the said Burrell, Miranda, and Thomas Daniels, and Nancy Newton, née Daniels, deceased, and possess no rights to enrollment as Cherokee freedmen other than as such descendants.

And it is further considered that, granting that those applicants herein born prior to the close of the rebellion and the said Nancy Newton, née Daniels, deceased, were, on or prior to February 11, 1867, domiciled citizens of the Cherokee Nation, they subsequently forfeited their Cherokee citizenship under the provisions of Section II, Article I, of the Cherokee Constitution, which, in part, provides:

"Whenever any citizen shall remove with his effects out of the limits of this nation and becomes a citizen of any other Government, all his rights and privileges as a citizen of this nation shall cease * * *."

It is therefore ordered and adjudged: That, under the provisions of section twenty-one of the act of Congress approved June 28, 1898 (30 Stat., 495), Burrell Daniels, Miranda Daniels, Robert Daniels, Thomas Daniels, Mary Daniels, Louella Daniels, Julia Daniels, Andrew Daniels, Willie Daniels, Lewis Daniels, Susie Daniels, Thomas Daniels, Burley Daniels, Essie Daniels, Minnie Daniels, Miranda Daniels (daughter of Andrew Daniels), Ruth Daniels, Burrell H. Daniels, Lizzie Haynes, Edward Haynes, Amos Haynes, Mack Daniels, Mady Daniels, Mary Hill, Alice Hill, Adran Hill, Lizzie Shafer, and Arlena Shafer are not entitled to enrollment as Cherokee freedmen, and their applications for enrollment as such are accordingly denied.

TAMS BIXBY, *Commissioner.*

Dated at Muskogee, Indian Territory, this Sep. 25, 1905.

I. T. D. 5330–1905.

DEPARTMENT OF THE INTERIOR,
Washington, May 13, 1905.

COMMISSIONER OF INDIAN AFFAIRS.

SIR: Referring to your office letter of February 15, 1905 (Land 4168–1905), there is inclosed herewith a copy of departmental letter of even date, sent direct to the Commission to the Five Civilized Tribes, rescinding departmental action of June 24, 1904, rejecting the applicants in the Cherokee Freedman case of Burrell Daniels et al., and directing the commission to institute rehearing, in accordance with the opinion of the Assistant Attorney General of May 9, 1905, in said case.

A copy of said opinion is inclosed for your information.

Respectfully,

THOS. RYAN, *Assistant Secretary.*

I. T. D. 5330–1905.

DEPARTMENT OF THE INTERIOR,
Washington, May 13, 1905.

COMMISSION TO THE FIVE CIVILIZED TRIBES,
Muscogee, Indian Territory.

GENTLEMEN: On June 24, 1904, following the recommendation of the Indian Office of June 17, 1904, the department affirmed your decision of January 18, 1904, refusing to enroll as Cherokee freedmen the applicants in the case of Burrell Daniels et al. (F. R. 40.)

A motion for review was filed on behalf of the applicants in this case and submitted to the Assistant Attorney General for this department for opinion. In an opinion rendered and approved May 9, 1905, the Assistant Attorney General held that if the principal applicant, after being freed from physical restraint, returned to his home in the nation within such time as was reasonably necessary considering his means and circumstances and the facilities for travel he should be regarded as never having been absent from the nation; further, that if, on the other hand, he pursued such course as showed an intent to choose a domicile and abide elsewhere, his rights should be determined precisely as those of a native Cherokee citizen would be who at that time removed from the nation and took up his residence at San Antonio.

The opinion was also expressed that as your commission did not base its decision upon proper grounds, but based it upon a supposed bar in Article IX of the treaty of 1866, regarding the applicant as not domiciled in the nation on or prior to August 11, 1867, whereas he should have been regarded as so domiciled therein, your decision should be vacated and the case readjudicated under the removal or expatriation provision of the Cherokee constitution, with liberty on the part of either Daniels or the nation to introduce further evidence bearing upon the question of intention to change his domicile prior to his actual return to the nation.

In accordance with this opinion, a copy of which is inclosed, the decision of the department in the case is hereby rescinded, the record and the papers are returned herewith, and you are requested to institute a rehearing in the matter.

Respectfully,

THOS. RYAN, *Acting Secretary.*

(I. T. D. 1706–1905. 9407–10081—1904.)

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE ASSISTANT ATTORNEY GENERAL,
Washington, May 9, 1905.

The SECRETARY OF THE INTERIOR.

SIR: I received by reference of February 10, 1905, for opinion thereon, the motion of counsel for the Cherokee freedmen for reconsideration of departmental decision of March 22, 1904, approving my opinion of that date, and by reference of February 18, 1905, for consideration in connection therewith, the record in the consolidated case of Burrell Daniels and others (twenty-eight persons) for enrollment as Cherokee freedmen. The latter case is before the department upon a motion of counsel of the applicants for review of the decision of the Commission to the Five Civilized Tribes adverse to the applicants.

My opinion of March 22, 1904, was rendered upon departmental reference of a request by the Commission to the Five Civilized Tribes for construction of the freedman enfranchisement clause of Article IX of the treaty of July 19, 1866 (14 Stat., 799, 801):

"That all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons

who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees: *Provided*, * * * ."

The opinion referred to, so far as herein question, summarized, was that: (1) The six months period (from ratification of the treaty August 11, 1867), is not a limitation, but a condition to the right granted, affecting all, competent or incompetent, and that return within the period therein fixed is an essential part of the facts out of which the right granted arises; (2) that "residents" had reference to the place of the freedman's legal domicile, and not to that of his then accidental, actual, physical presence or temporary place of abode.

The contention of counsel for the freedmen in the present motion is that the provision, "and are now residents therein, or who may return within six months," has reference only to "free colored persons who were in the country at the commencement of the rebellion," and has no reference to the former slaves described as freedmen liberated by their owners or by law. This contention is based upon an analysis of the grammatical structure and punctuation of the provision, which I have carefully considered, but deem unnecessary here at any great length to discuss. Grammatical structure and punctuation are both proper aids to construction, but neither nor both combined exclude other inquiry into the legislative intent which must always control, when satisfactorily ascertained, though both grammatical structure and rules for punctuation be disregarded. By this, however, I am not to be understood as conceding the contention that either the grammatical structure or the punctuation indicates that the six months period had reference to the "free colored persons" only, or did not refer to the liberated former slaves. As to structure of the sentence, it appears to me that the words "as well as" are strongly conjunctive, not disjunctive. The phrase "as well as" is defined in the Century Dictionary and Webster's International Dictionary, at the word "as," as meaning "just as much, equally (with), in addition (to), besides, no less (than)." All these definitions or equivalents of "as well as" indicate the idea of equality of merit and of benefit, rather than an intent to give more privilege to or to impose less burdensome obligation or condition upon the first class than upon the second. The circumstances of the time were that the former slaves had late been mere things, chattels, not men, and their claim to recognition and just treatment as members of the organized society could hardly have won higher recognition than that given other persons of the same race who had attained to free manhood years before, or even higher than that given the free-born full-blood Cherokee. A construction that would lead to such result is, in light of the circumstances of the time, not only irrational, but almost unthinkable, and is clearly erroneous.

As to punctuation, had the intention been to confine the operation of the six months return period to the second or free colored person class alone, no punctuation to break the flow of connected thought was necessary or appropriate from its initiation with the words "as well as" until the words "six months," when, on this theory, the thought culminated was fully expressed and a natural

pause was reached. In fact the punctuation is against the theory sought to be based upon it.

The Cherokee Nation at that time had a constitutional provision (sec. 2, art. 1) against their own full-blood citizens that:

"Whenever any citizen shall remove with his effects out of the limits of this nation, and becomes a citizen of any other government, all his rights and privileges as a citizen of this nation shall cease."

This provision operated instantly upon the native Cherokee whenever and as soon as he removed his person and effects from the nation and identified himself with a community alien to it. Had the treaty benefit been limited only to such freedmen or former slaves as were then in and identified with the nation, the provision would have been as liberal to the freedmen as was the Cherokee constitution toward its own full-blood citizens. In giving a six months period for their return the treaty was more liberal to the freedmen than was the constitutional provision to the native-born. This no doubt was due to the conditions of the time at close of a period of war when social disorder caused many to remove to safer localities. The proper period to be allowed because of such conditions was one to be determined by the treaty parties, but consideration of the circumstances of the time and the provision of the constitution of the Cherokee Nation show that it could not have been intended to give freedmen an unlimited time to return and thus to extend a privilege as to absence far above that of full-blood native citizens.

For these reasons, as well as those advanced in my former opinion, I am of opinion that the six months period in Article IX of the treaty, *supra*, applies equally to former slaves and to former free persons of color, and adhere to the opinion formerly expressed.

Passing now to the case of Burrell Daniels and others, I desire to call attention to the opinion of March 22, 1904, that "residents" in the treaty has reference to the place of legal domicile, not that of actual accidental presence, and also to my opinion of April 16, 1904 (in I. T. D. 8308–1903; 799 and 1240–1904), in case of Charles Foreman, in the final paragraph of which it was noticed that "one under actual restraint, whether legal or not, can not freely choose his own place of abode or his domicile," meaning thereby his place of usual actual physical presence and place of living. At the time of emancipation of the slaves by the Cherokee Nation, February, 1863, referred to by Article IX of the treaty (14 Stat., 801), the slave became a free man, and the right of choice of domicile arose to him. Under undisturbed conditions the presumption would arise of his domicile at his place of actual residence. The record, however, shows that at the close of the War of the Rebellion Daniels was, with some others, in actual servitude. Conditions were not undisturbed. He had been put by his master under control of insurgent military authority. When the war ceased some of these insurgent organizations or bands went to Mexico, carrying Daniels with them, and sold him to Mexicans, where he was held in peonage until his return was effected by intervention of the United States.

It does not appear when Daniels's deportation occurred more definitely than that it was after Kirby Smith's surrender (May 26, 1865), and before August 20, 1866, as Colonel Bryant, in command of the force holding Daniels, had been ordered to turn in his camp

equipage, but refused to do so, went south through Texas into Mexico, taking with him the negroes and a herd of cattle. By August 20, 1866, the banditti which infested Texas after the surrender of the organized armies had been suppressed, dispersed, or expelled, and the termination of the period of war was proclaimed (14 Stat., 814). Colonel Bryant's party was one of these insurgent banditti, and Daniel's removal, deportation into peonage in Mexico, was evidently after the fall of the organized confederate government and surrender of its armies, and was without any semblance of authority of an organized government, but was a mere act of brigandage. It is clear that Daniel's deportation by brigands and sale into peonage in Mexico and his detention there worked no change in his residence and forfeited no rights. While held in peonage he must be regarded as resident and domiciled in the Cherokee Nation, and his children born there as born in the nation.

The United States interfered in his behalf, effected his release from peonage, and returned him to the United States after about six or seven years of foreign servitude. He was not returned, however, to his home in the nation, but was left in San Antonio, in Texas, about seven hundred miles from the Cherokee country, where no railroads had pentrated those regions or afforded facility for travel. His rights and the consequences of his delay in effecting his actual return from San Antonio to the Cherokee Nation must be determined upon the same principles as the case of a native Cherokee citizen under section 2, article 1, of the Cherokee constitution, had a native citizen, at the time of Daniel's return by the United States to San Antonio, been forcibly taken and set down at San Antonio.

To that time Daniels had been able to do nothing and had done nothing to change his legal domicile from the nation. He had been forcibly and tortiously deported by brigands and sold into servitude. No rights could be lost thereby. In legal aspect he was while in foreign peonage an actual resident of the Cherokee Nation and citizen thereof under Article IX of the treaty. If upon being freed from physical restraint he returned to his home in the nation within such time as was reasonably necessary, considering his means and circumstances and the facilities for travel, he should be regarded as never having been absent from the nation. If, on the other hand, he pursued such course as showed an intent to choose a domicile and abide there, his rights should be determined precisely as those of a native Cherokee citizen would be who at that time removed from the nation and took up his residence at San Antonio.

As to what the fact was in this respect I do not regard it proper for me, in the first instance, to find from the evidence in the record, this forestalling the Commission to the Five Civilized Tribes and the proper reviewing officers whose province it is to adjudge the facts. As the commission did not base their decision upon proper grounds, but based it upon a supposed bar in Article IX of the treaty against their consideration of these facts, regarding him as not domiciled in the nation on or prior to August 11, 1867, whereas he should be regarded as so domiciled therein, I am of opinion their decision should be vacated and the case readjudicated under the removal or expatriation provision of the Cherokee constitution with liberty on the part of either

Daniels or the nation to introduce further evidence bearing upon the question of intention to change his domicile prior to his actual return to the nation.

Very respectfully,

(Signed) FRANK L. CAMPBELL,
Assistant Attorney General.

Approved May 9, 1905.

(Signed) E. A. HITCHCOCK,
Secretary.

I. T. D. 10081–1904.

DEPARTMENT OF THE INTERIOR,
Washington, January 14, 1905.

COMMISSIONER OF INDIAN AFFAIRS.

SIR: A motion for rehearing having been filed in the Cherokee freedman case of Burrell Daniels et al., it is requested that you transmit the record in said case to the department.

The papers in this case were returned to your office with departmental letter of June 24, 1904.

Respectfully,

M. W. MILLER,
Assistant Secretary.

I. T. D. 5040–1904.

DEPARTMENT OF THE INTERIOR,
Washington, June 24, 1904.

COMMISSIONER OF INDIAN AFFAIRS.

SIR: Referring to the Acting Commissioners' communication of June 17, 1904 (Land 5520–1904), there is inclosed herewith departmental letter to be forwarded to the Commission to the Five Civilized Tribes, affirming its decision rejecting the applications for the enrollment of Burrell Daniels et al., as Cherokee freedmen.

The papers in the case are returned herewith.

Respectfully,

E. A. HITCHCOCK, *Secretary.*

D. C. 21703–1904.
I. T. D. 5040–1904.

DEPARTMENT OF THE INTERIOR,
Washington, June 24, 1904.

COMMISSION TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

GENTLEMEN: January 19, 1904, you transmitted the record in the consolidated case embracing the applications of Burrell Daniels et al. (F. R–40 et al.), for enrollment as Cherokee freedmen, including your decision of January 18, 1904, rejecting said applications.

Reporting June 17, 1904, the Acting Commissioner of Indian Affairs recommends that your decision be approved. A copy of his letter is inclosed.

The department concurs in said recommendation, and your decision is hereby affirmed.

Respectfully,

(Signed) E. A. HITCHCOCK,
Secretary.

Refer in reply to the following:

Land.
5520–1904.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, June 16, 1904.

The honorable the SECRETARY OF THE INTERIOR.

SIR: I have the honor to inclose herewith a report from the Commission to the Five Civilized Tribes, transmitting the record of the application for enrollment as Cherokee freedmen of Burrell Daniels for himself and his wife Miranda Daniels and minor child, Robert Daniels; by Andrew Daniels for himself and minor children Willie, Lewis, Susie, Thomas, Burley, Essie, Minnie, Miranda, and Ruth Daniels; by Lizzie Shafer for herself and minor child Arlena Shafer; by Mary Hill for herself and minor children, Alice and Adran Hill; by Lizzie Hayne for herself and minor children, Edward and Amos Hayne; by Mack Daniels for himself and minor child, Mady Daniels; by Thomas Daniels for himself and minor children, Mary, Louella, and Julia Daniels, and by Burrell H. Daniels for himself.

January 18, 1904, the commission found that the applicants were not entitled to enrollment as Cherokee freedmen.

The evidence shows that the applicant, Burrell Daniels, and Miranda, his wife and his minor child, Thomas Daniels, were the slaves of a Cherokee citizen at the commencement of the War of the Rebellion; that during the war they were taken out of the Cherokee Nation; that after the war they were kidnaped by one Col. Bryant and carried into Mexico and sold into peonage; that in 1871 they were released from servitude and arrived in San Antonio, Texas, during that year; that they did not return to the Cherokee Nation until the year 1884. The other claimants have no rights except as derived from Burrell, Miranda, or Thomas Daniels.

Under date of January 16, 1897, this office submitted for consideration and approval the Kern-Clifton roll of Cherokee freedmen. With reference to Burrell Daniels the office said:

"Commissioners Clifton and Kern join in especially requesting the department to place upon the roll the name of Burrell Daniels, No. 4501, and his family. These commissioners state as follows:

"'It was not in the power of the commission to do this because the evidence shows that he did not return until 1870 or later, but the evidence also shows that at the conclusion of the war he was sold by his owner, a Cherokee, into slavery into Mexico, and kept there for five years, until by the interference of this Government he was taken from Mexican slavery and at once returned to the Cherokee Nation. He and his family are estimable citizens, and these two commissioners believe that the Cherokee Nation, whilst not willing to recommend his enrollment, yet would not be adverse to having him enrolled.

"The same question was raised in this case before Commissioner Wallace, and the facts as stated by these commissioners and as stated by Mr. Daniels himself in his testimony, submitted by them, are corroborative of the testimony as given before Commissioner Wallace and upon which he was enrolled by the department. While under a literal interpretation of the language of the treaty he might be entitled

to enrollment, it was certainly not the spirit of the treaty to exclude persons of this class."

By letter of January 16, 1897 (Ind. Div. 8075–1896), the department approved the enrollment of Burrell Daniels.

It does not appear necessary to pass upon the question of the duress of the claimants, Burrell, Miranda, and Thomas Daniels, during the period allotted for the return of freedmen to the Cherokee Nation, ending February 11, 1867, for the reason that they do not appear to have made proper effort to return to the Cherokee Nation and claim their rights. On the contrary, it is shown that it took them thirteen years from the time of their release from peonage to get to the Cherokee Nation.

In view of the record, the approval of the commission's decision, adverse to the applicants, is recommended.

Very respectfully,

A. C. TONNER,
Acting Commissioner.

DEPARTMENT OF THE INTERIOR, COMMISSION TO THE FIVE CIVILIZED TRIBES.

In the matter of the application of Burrell Daniels et al. for enrollment as Cherokee freedmen, consolidating the applications of—

Burrell Daniels et al	Cherokee freedmen R 40
Andrew Daniels et al	Cherokee freedmen D 861
Lizzie Shafer et al	Cherokee freedmen D 916
Mary Hill et al	Cherokee freedmen D 917
Lizzie Haynes et al	Cherokee freedmen D 941
Mack Daniels et al	Cherokee freedmen D 1089
Thomas Daniels et al	Cherokee freedmen D 1100
Burrell H. Daniels	Cherokee freedmen D 1101

DECISION.

The record herein shows that applications for enrollment as Cherokee freedmen were made to this commission by Burrell Daniels, for himself and wife, Meranda Daniels, and minor child, Robert Daniels; by Andrew Daniels, for himself and minor children, Willie, Lewis, Susie, Thomas, Burley, Essie, Minnie, Miranda, and Ruth Daniels: by Lizzie Shafer, for herself; that, subsequent to the date of the original application, a birth affidavit, which is made a part of the record herein, was filed with the commission showing the birth of Arlena Shafer; by Mary Hill, for herself and minor child, Alice: that, subsequent to the date of the original application, a birth affidavit, which is made a part of the record herein, was filed with the commission, showing the birth of Adran Hill; by Lizzie Haynes, for herself and minor child, Edward Haynes; that, subsequent to the date of the original application, a birth affidavit, which is made a part of the record herein, was filed with the commission, showing the birth of Amos Haynes; by Mack Daniels, for himself and minor child, Mady Daniels; by Thomas Daniels, for himself and minor children, Mary, Louella, and Julia Daniels; and by Burrell H. Daniels, for himself.

The evidence shows that the said Burrell Daniels and his wife, Meranda, together with their children, Nancy Daniels, now deceased,

and Thomas Daniels, were slaves of Cherokee citizens at the commencement of the war of the rebellion; that during said war they were taken out of the Cherokee Nation and did not return thereto until sometime after the year 1879; that the said Andrew Daniels was born during the war of the rebellion and came to the Cherokee Nation with his father and mother on their said return. All the other applicants herein have been born since 1866 and are descendants of and claim right to enrollment through the said Burrell, Meranda, Thomas, Nancy, or Andrew Daniels.

None of the names of said applicants herein are found on the 1880 authenticated roll of the Cherokee Nation.

It is therefore the opinion of this commission that the applications for the enrollment of Burrell Daniels, Meranda Daniels, Robert Daniels, Andrew Daniels, Willie Daniels, Lewis Daniels, Susie Daniels, Thomas Daniels, son of Andrew Daniels, Burley Daniels, Essie Daniels, Minnie Daniels, Miranda Daniels, Ruth Daniels, Lizzie Shafer, Arlena Shafer, Mary Hill, Alice Hill, Adran Hill, Lizzie Haynes, Edward Haynes, Amos Haynes, Mack Daniels, Mady Daniels, Thomas Daniels, Mary Daniels, Louella Daniels, Julia Daniels, and Burrell H. Daniels, as Cherokee freedmen, should be denied under the provisions of section twenty-one of the act of Congress approved June 28, 1898 (30 Stats., 495), and it is so ordered.

COMMISSION TO THE FIVE CIVILIZED TRIBES.
TAMS BIXBY, *Chairman.*
T. B. NEEDLES, *Commissioner.*
C. R. BRICKINRIDGE, *Commissioner.*
W. E. STANLEY, *Commissioner.*

Muskogee, Indian Territory, this Jan. 18, 1904.

I. T. D. 1804–1907.

FEBRUARY 2, 1907.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

SIR: Referring to the motion filed for a rehearing of the consolidated Cherokee freedman case of Mariah Hayden et al., on July 26, 1906, the attorney for the Cherokee Nation filed a reply to the motion, in which the jurisdiction of the notary before whom the affidavits filed in support of the motion were executed was questioned.

On August 3, 1906, attorneys for applicants filed a motion to strike from the record certain testimony attached to the reply of the attorney for the Cherokee Nation, and on August 8, 1906, attorneys for applicants filed a brief.

On August 16, 1906, the attorney for the Cherokee Nation filed a reply to the motion to strike the testimony from the record referred to.

The record shows that the decision of the Commission to the Five Civilized Tribes, dated August 30, 1902, rejecting the applications for enrollment of Mariah Hayden, Sarah A. Buckman, and her three children, and Ella Huddleston and her minor child was affirmed by the department on November 28, 1902.

On January 8, 1907, attorneys for applicants in a letter to you represented that the principal applicant in this case, Mariah Hayden, had been unable to produce additional evidence and "we do not

believe that it would be of any benefit to these applicants to go to trial in this case with the testimony of only these three witnesses (parties to the affidavits filed in support of the motion), one of whom is the principal applicant, and after a careful examination of the entire record in this case we do not feel warranted in asking the honorable Commissioner to the Five Civilized Tribes and the honorable Secretary of the Interior for a rehearing in this case."

The attorneys request that their motion be dismissed.

In view of the showing made and of the request of the attorneys for applicants, the department concurs in the recommendation of your office and of the Indian Office that the request be granted, and that the motion therewith included be denied.

The record in the case of Andy Rider et al., which includes the case of Mariah Hayden et al., together with the other papers in the case, have been sent to the Indian Office for its files.

Respectfully,

THOS. RYAN,
First Assistant Secretary.

(Through the Commissioner of Indian Affairs.)

I. T. D. 622–1907.

JANUARY 21, 1907.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

SIR: June 4, 1906, you transmitted the record in the matter of the application for the enrollment of Andy Rider as a Cherokee freedman, including your decision of the same date adverse to the applicant.

Reporting January 10, 1907 (Land 70323–1906), the Indian Office recommended that your decision be approved. A copy of its letter is inclosed.

The department concurs in said recommendation, and your decision is hereby affirmed.

The papers in the case have been sent to the Indian Office for its files.

Respectfully,

THOS. RYAN,
First Assistant Secretary.

(Through the Commissioner of Indian Affairs.)

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory, January 9, 1907.

The honorable the SECRETARY OF THE INTERIOR.

SIR: There is inclosed a motion filed June 25, 1906, by Starr & Patten, attorneys, Vinita, Indian Territory, for a rehearing of the consolidated Cherokee freedmen cases of Mariah Mayden et al. July 26, 1906, the attorney for the Cherokee Nation filed a reply to said motion in which he questioned the jurisdiction of the notary public before whom the affidavits filed in support of the motion were executed. August 3, 1906, attorneys for applicants filed a motion to strike from the record certain testimony attached to the nation's

reply, and on August 6, 1906, said attorney filed a brief in the matter. August 16, 1906, the attorney for the Cherokee Nation filed a reply to the motion to strike the testimony referred to from the record.

The decision of the Commission to the Five Civilized Tribes dated August 30, 1902, rejecting the applications for the enrollment of Maria Hayden, Sarah A. Buckner, and her three children and Ella Huddleston and her minor child, was affirmed by the department November 28, 1902 (I. T. D. 6964–1902).

Messrs. Starr & Patten represent a majority of the Cherokee freedmen cases pending at this time, and they have filed a number of motions to reopen and reconsider cases, under the act of Congress approved April 26, 1906. They have supplemented their motions by additional motions and affidavits which they have forwarded to this office from time to time, with the request that they be filed with their motions filed within the time limited by law. On December 21, 1906, Mr. J. C. Starr, a member of said firm, verbally advised the commissioner that his firm had filed all the papers they desired in support of their motions.

No showing is made that would warrant a recommendation that the motion herewith transmitted be granted.

In their letter of January 8, 1907, attorneys for applicants stated that the principal applicant in this case, Maria Hayden, has been unable to produce additional evidence and "we do not believe it would be of any benefit to these applicants to go to trial in this case with the testimony of only these three witnesses (parties to the affidavits filed in support of the motion), one of whom is the principal applicant; and after a careful examination of the entire record in this case we do not feel warranted in asking the honorable Commissioner to the Five Civilized Tribes and the honorable Secretary of the Interior for a rehearing in this case." The attorneys request that their motion be dismissed.

In view of the showing made, and of the record in the case, it is respectfully recommended that the request of said attorneys be granted, and that the motion herewith inclosed be denied.

Respectfully,

TAMS BIXBY, *Commissioner.*

(Through the Commissioner of Indian Affairs.)

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory, June 4, 1906.

The honorable the SECRETARY OF THE INTERIOR.

SIR: There is transmitted herewith the record of proceedings had in the Cherokee freedmen enrollment case of Andy Rider, together with a decision of the Commissioner to the Five Civilized Tribes, dated June 4, 1906, rejecting said application.

On October 10, 1905 (I. T. D. 5988–1902, 5630–1905, 8880–1905), the department remanded this case to this office for rehearing and readjudication.

Respectfully,

TAMS BIXBY, *Commissioner.*

(Through Commissioner of Indian Affairs.)

DEPARTMENT OF THE INTERIOR

COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

In the matter of the application for the enrollment of Andy Rider as a Cherokee freedman.

DECISION.

The record in this case shows: That on August 30, 1902, the Commission to the Five Civilized Tribes rendered its decision herein denying, among others, this applicant the right to enrollment as a Cherokee freedman (for proceedings in this case prior to that date see said decision), and that its decision as to him was concurred in by the Commissioner of Indian Affairs and affirmed by the department on November 28, 1902 (I. T. D. 6964–1902). And that thereafter, to wit, on October 10, 1905 (I. T. D. 8880–1905), on motion of the applicants, the department rescinded its decision of November 28, 1902, and remanded the case for a rehearing as to the rights of said applicant to Cherokee freedman citizenship. In compliance therewith further proceedings were had on November 16, December 8 and 21, 1905, January 4 and 25 and April 4 and 12, 1906, at Vinita and Muskogee, Indian Territory, respectively Copies of the testimony taken before the Commission to the Five Civilized Tribes on May 26, 1905, in the cases of Mariah Johnson et al., C. F. R. 210, 211, 212, of the applicant's enrollment on the Cherokee tribal census roll of 1893, a decree of the Daniels court relative to one Reuben Still, and letters of Indian Office and department dated November 11, 1905, and March 23, 1906, respectively, are filed herewith and made a part of the record in this case.

The evidence in this case shows: That the applicant herein was born about the year 1862, and is the child of one Nancy Still, deceased, who, it is alleged, was the slave of Cook Still, a Cherokee citizen. In its decision rendered on October 5, 1905, in the case of Paulina Turk et al., C. F. D. 565, this office found that the said Cook Still owned no slaves at the commencement of the rebellion, and its decison was concurred in by the Commissioner of Indian Affairs and affirmed by the department on March 23, 1905 (I. T. D. 14942–02, 8405–06).

After ample opportunity having been afforded, it is not established by satisfactory evidence that the applicant herein obtains any right to Cherokee freedman citizenship through his father; hence this part of his application comes within the ruling of the department in the cases of Eliza Bryant et al. (I. T. D. 544–04), William Rector (I. T. D. 1468–04), Minnie Duncan et al. (I. T. D. 1470–04), Samantha Chambers (I. T. D. 2296–04), Ed Williams (I. T. D. 4230–04), Moses Ross (I. T. D. 6056–04), Jane Looney et al. (I. T. D. 6410, 12688–04) Florence Bratcher (I. T. D. 12692–04), and Frankie Grimmett (I. T. D. 17902–1905).

It is therefore ordered and adjudged, that for the additional reasons set out herein the decision of the Commission to the Five Civilized Tribes of August 30, 1902, relative to the right of this applicant to Cherokee freedman citizenship, should be affirmed, and that, under the provisions of section twenty-one of the act of Congress approved

June 28, 1898 (30 Stat., 495), Andy Rider is not entitled to enrollment as a Cherokee freedman, and his application for enrollment as such is accordingly denied.

TAMS BIXBY, *Commissioner.*

Dated at Muskogee, Indian Territory, this June 4, 1906.

I. T. D. 15658–1905.

DEPARTMENT OF THE INTERIOR,
Washington, November 28, 1905.

COMMISSIONER OF INDIAN AFFAIRS.

SIR: Referring to your office letter dated November 21, 1905 (Land 90155), there is inclosed herewith departmental letter to be forwarded to the Commissioner to the Five Civilized Tribes, returning the testimony heretofore taken in the case of Henry C. Hayden et al., in accordance with his request of November 4, 1905.

The papers in said case received with your office letter of May 15, 1905 (Land 34603), not sent to the Commissioner to the Five Civilized Tribes, are inclosed herewith.

Respectfully,

THOS. RYAN,
First Assistant Secretary.

I. T. D. 15658–1905.

NOVEMBER 28, 1905.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

SIR: In accordance with your request of November 4, 1905, received with Indian Office letter of November 21, 1905, there is inclosed herewith the testimony heretofore taken in the Cherokee freedman case of Henry C. Hayden et al., which includes the testimony relative to Andy Rider, the subject of departmental letter of October 10, 1905. There are also inclosed motions for rehearing, review, and certain other papers received in the department. (6 inclosures.)

Respectfully,

THOS. RYAN,
First Assistant Secretary.

I. T. D. 5988–1902, 5630–1905, 8880–1905.

OCTOBER 10, 1905.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

SIR: The department has considered a "motion for review and rehearing" by Andy Rider, applicant for enrollment as a Cherokee freedman, received with Indian Office letter of May 15, 1905, copy inclosed (Land 34603).

Argument by the attorneys for the Cherokee Nation in opposition to said motion was received July 22, 1905.

The applicant is one of the parties to the case of Henry O. Hayden et al., disposed of in departmental letter of November 28, 1902, in which the decision of the Commission to the Five Civilized Tribes, adverse to the applicants, was affirmed

Andy Rider claims to have returned to the Cherokee Nation in the fall of 1866, when about six years of age, with Maria Hayden, who was one of the principal applicants in the case mentioned. It is insisted in the motion that the testimony shows that Mrs. Hayden made three trips to the Cherokee Nation, the second in the fall of 1866, and that she brought Andy Rider with her on this trip, and that he remained in the nation after that time.

The department in its decision of November 28, 1902, admitted that it was possible that Mrs. Hayden might have been in the Cherokee Nation in 1866. A reexamination of the testimony shows that this is very doubtful. There is little testimony contradicting the allegations by one or two witnesses that Andy Rider was brought to the nation by her, as claimed, in 1866.

The Commission to the Five Civilized Tribes seemed to have made little effort to discover the facts as to this principal applicant, neither apparently did the attorneys for the nation, assuming probably, as the department did in considering the testimony, that if Mrs. Hayden's application were rejected, necessarily Andy Rider's fell with it. This is not necessarily true.

The department considers it advisable that a rehearing should be had as to this applicant, and such rehearing is hereby directed.

The attorneys for the nation assert that the witnesses who have testified for Rider are disreputable and unworthy of belief. This they will have an opportunity to show at the rehearing.

The motion in question and the argument by the attorneys for the nation are inclosed. If you deem it necessary the testimony heretofore taken will be returned to you.

Respectfully, E. A. H., *Secretary.*

(Through the Commissioner of Indian Affairs.)

I. T. D. 5988–1902, 641–1904.

DEPARTMENT OF THE INTERIOR,
Washington, January 29, 1904.

The COMMISSIONER OF INDIAN AFFAIRS.

SIR: Receipt is hereby acknowledged of the papers in the case of Henry C. Hayden et al., applicants for enrollment as Cherokee freedmen, informally returned to the department this day.

Attention is called to departmental letter of November 28, 1902, relative to this case.

The papers will be returned to your office in due time.

Respectfully,

THOS. RYAN, *Acting Secretary.*

D. C. 23527–1902. I. D. T. 5988, 6242–1902; 6271, 6437, 6595, 6607–1902; 6865, 6871, 6964–1902.

DEPARTMENT OF THE INTERIOR,
Washington, November 28, 1902.

COMMISSION TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

GENTLEMEN: The department has considered, in connection with the arguments presented, the consolidated case involving the appli-

cation of Henry C. Hayden for the enrollment of his wife, Maria Hayden, as a Cherokee freedman, and himself as a Cherokee freedman by intermarriage; the application of Sarah E. Buckner for the enrollment of herself and children, Arthur, Bessie, and George W. Buckner, as Cherokee freedmen, and for the enrollment of her husband, George B. Buckner, as a Cherokee freedmen by intermarriage; of Andy Rider for the enrollment of himself as a Cherokee freedman, and the application of Ella Huddleston for the enrollment of herself and her child, Ora L. Huddleston, as Cherokee freedmen.

The act of June 28, 1898 (30 Stat., 495), directs your commission to—

"Make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six."

On May 11, 1900, the department stated that a roll was made under said decree, known as the Clifton roll, which was approved by the department in 1897; that it has been claimed that said roll contains many names not properly belonging there, but whether this fact influenced Congress to disregard that roll and direct, in said act of June 28, 1898, that a new one be made in strict compliance with said decree is immaterial, for the fact remains that the decree alone is to be taken as a guide for making the roll which your commission is to prepare; that it is your duty now to make a roll which shall include the names of all Cherokee citizens—

"Who are or were freedmen who had been liberated by voluntary act of their former owners, or by law, as well as all free colored persons who were in the Cherokee country at the commencement of the rebellion, and were residents therein at the date of said treaty, or who returned thereto within six months thereafter, and their descendants."

On August 30, 1900, you rejected the applications, stating that Maria Hayden and her husband, Henry C. Hayden, were residents in the State of Kansas from 1866 until about 1873; that they did not remove to and take up their residence in the Cherokee Nation "until after that year;" that among those returning to the Cherokee Nation with the said Maria Hayden was the said Andy Rider, who appears to have been a member of the family; that Sarah E. Buckner was a minor and living with her mother in 1866; that she claims to have returned to the Cherokee Nation with her mother, Maria Hayden, and the evidence also shows that said Sarah E. Buckner resided with her husband in the State of Kansas for eight years or more after the year 1873, and you held that the preponderance of the evidence shows that the applications of those not claiming by intermarriage should be denied under section 21 of the act of June 28, 1898; also that no person is entitled to enrollment as a Cherokee freedman by intermarriage.

Maria Hayden was, it is alleged, a slave of a Cherokee Indian residing in the Cherokee Nation, and was taken to Kansas during the Civil War. It is testified, but not in a satisfactory manner, that she first returned to the Cherokee Nation in the spring or summer of 1866, and again in the fall of that year, without her husband, and that she selected a tract of land and had erected thereon a little log cabin, which she did not occupy. Her husband lived in Kansas and did not go to the Cherokee Nation to live until the fall of 1873, though it is claimed he was there in 1867 and then stayed two months. Her

son, Henry Still, appears to have bought at that time the place they are living on at present. Her name is not on the 1880 roll or the 1896 census roll. It is on the Wallace roll and the Clifton roll, which latter roll was made by virtue of a decree of the Court of Claims of February 3, 1896, mentioned in the act of June 28, 1898. The chief witnesses for the claimant, while testifying as to certain things having taken place from 1866 to 1867, and to having seen Mrs. Hayden in the Cherokee Nation at that time, are shown to be ignorant as to dates generally. There is wanting satisfactory evidence that the claimant removed to and took up her residence in the Cherokee Nation within the time specified in the treaty of 1866, from which a part of the quotation in departmental letter of May 11, 1900—

"Who are or were freedmen who had been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the Cherokee country at the commencement of the rebellion and were residents therein at the date of said treaty, or who returned thereto within six months thereafter, and their descendants,"

was taken. It is testified by several witnesses for the nation who knew Hayden and were near neighbors of him in Kansas that he and his family, including his wife, came to Kansas in 1865 and continued to live there until 1873; that Mrs. Hayden was there all the time; at least that if she was absent at all it was for very short periods and not frequently. It also appears that Mrs. Hayden was married to Reuben Still; that they parted without a divorce before the Civil War, and that she married Hayden in 1863 and again in the Cherokee Nation in 1874. Reuben Still died in 1879.

In regard to Mrs. Buckner and those claiming through her, it appears that she was born in 1856 in the Cherokee Nation, and she claims to have removed from Kansas to the Cherokee Nation with her mother, Maria Hayden, when a child in 1866, and stayed there for a short time until her mother sent her to school in Kansas; that she was in Kansas only during the school term of each year for several years, and that during vacations she returned to the Cherokee Nation. March 21, 1874, at the age of 17, she married Buckner, a colored man and a citizen of the United States, under Cherokee license. She had previously married him in Kansas in 1873 at her father's home. She and all except one of her children are on the Clifton roll. After Sarah Buckner married she claims she lived at her mother's and "lots of other places" in Kansas, except when in the Cherokee Nation; that she was in Kansas educating her children school months of several years, which appears must have been seven or eight months of each year. There is considerable vagueness and some contradictions in the testimony offered. Besides, the testimony is furnished by the Cherokee Nation that Buckner and his wife lived in Kansas many years after the Civil War, before permanently locating in the Cherokee Nation. While it may be probable that Mrs. Hayden and Mrs. Buckner were in the Cherokee Nation at certain periods in 1866 and 1867, though the testimony is very unsatisfactory on that point, and Mrs. Buckner after her marriage was there in 1873, their homes were actually and legally with their husbands in Kansas.

As to Ella Huddleston and her child, it appears that her name is on the Clifton roll, but not on the 1880 or 1896 rolls of the Cherokee

Nation. She is the daughter of George B. Buckner and Sarah E. Buckner; was born in 1874, and was married in Kansas in 1898, and claims to have lived in the Cherokee Nation except when at school in Kansas. As to her home before marriage, it was with her mother, and as it has been found that her mother is not entitled to enrollment, it follows that these applicants are not entitled to enrollment.

In regard to Andy Rider, it appears that at the beginning of the rebellion he was the slave of a Cherokee citizen. His name is not on the 1880 or 1896 Cherokee rolls. It is on the Wallace and Clifton rolls. He claims to have been born in 1861 or 1862 in the Cherokee Nation and to have been taken to Kansas during the Civil War and and to have returned to the nation in the fall of 1866 with Mrs. Hayden. He knows nothing as to this, however, except what has been told him. It is alleged in the testimony in the Hayden and Buckner cases that he returned to the nation with Mrs. Hayden and resided there with her or with Mrs. Buckner. The testimony having been found not sufficient to show that Mrs. Hayden and Mrs. Buckner had been residents in the Cherokee Nation in the time necessary, the applicant, Andy Rider, is not entitled to enrollment.

On September 13, 1902, Commissioner Breckinridge addressed a communication to your commission, in which he states in regard to your decision that he agrees that none of the applicants are entitled to enrollment; that he does not concur in the general statement that

"No person is entitled to enrollment as a Cherokee freedman by intermarriage;"

that as these applicants as such are not entitled to be so enrolled, it should be so stated; that he would not travel out of the case to express a general proposition that may give trouble in other cases and which he is not prepared to assent to.

Submitting the case September 30, 1902, the Commissioner of Indian Affairs holds that your decision is correct except as to the parties claiming as intermarried citizens. His reasons for so holding are set forth fully. A copy of his letter is inclosed.

A motion for rehearing has been made by the attorney for the applicants, claiming that it was erroneous to omit from the rolls being prepared by you the names of persons on the Clifton roll. This question was settled by the department on May 11, 1900. It is also alleged that your decision is not supported by the evidence; that you erroneously accepted incompetent, irrelevant, and immaterial matter, and that you have misconstrued the law as to what constitutes residence. Rehearing is also asked because of "newly discovered evidence," and offer to show among other things that the witness Fallow, introduced by the Cherokee Nation as probably its most important witness, offered to testify to the exact opposite of the testimony he gave if he were paid for so doing.

The department considers the reasons given not sufficient to warrant granting the request. In view of the fact that on August 5, 1902, the department, in the matter of the application of Benjamin Crittenden, for the enrollment of his wife as an intermarried citizen, requested an expression of your views of the objections raised in that case by the nation, on the ground that the woman was a colored person, but to which no answer has been received, and in view of the decision of the United States court rendered October 26, 1901, in the case of Buffington et al., plaintiffs, against Henry L. Dawes et al.,

defendants, in equity, No. 4424 (pending on appeal), the department affirms your decision without expressing an opinion whether, under the act of June 28, 1898, persons are entitled to enrollment as Cherokee freedmen by intermarriage.

Respectfully,

THOS. RYAN,
Acting Secretary.

DEPARTMENT OF THE INTERIOR, COMMISSION TO THE FIVE CIVILIZED TRIBES.

In the matter of the application of Henry C. Hayden et al. for enrollment as Cherokee freedmen, consolidating the applications of—

Henry C. Hayden et al.....Cherokee freedmen D 498
George B. Buckner et al.....Cherokee freedmen D 499
Andy Rider.....Cherokee freedmen D 500
Ella Huddleston et al.....Cherokee freedmen D 572

DECISION.

The record herein shows that applications were made to this commission as follows:

D 498. By Henry C. Hayden, at Chelsea, Indian Territory, on June 3, 1901, for the enrollment of his wife, Maria Hayden, as a Cherokee freedman, and for the enrollment of himself as a Cherokee freedman by intermarriage. Further proceedings were had in the matter of said application at Vinita, Indian Territory, on October 21, 1901, and at Muskogee, Indian Territory, on April 28, May 26, May 29, and May 31, 1902. Copies of the testimony taken on May 22, 1902, at Muskogee, in the matter of the application of Charles C. Smith; on March 4, 1902, at Muskogee, in the matter of the application of Edward Wright; on May 9, 1901, at Vinita, Indian Territory, in the matter of the application of Aaron Webber; on October 29, 1901, in the matter of the application of Joe Ross, and all testimony taken in the matter of the application of Elizabeth Meigs has been filed herewith and made a part of the record herein.

D 499. By Sarah E. Buckner, at Chelsea, Indian Territory, on June 3, 1901, for the enrollment of herself and her minor children, Arthur, Bessie, and George W. Buckner, as Cherokee freedmen, and for the enrollment of her husband, George B. Buckner, as a Cherokee freedman by intermarriage. Further proceedings were had in the matter of said application at Muskogee, Indian Territory, on May 19 and May 21, 1902.

D 500. By Andy Rider, at Chelsea, Indian Territory, on June 3, 1901, for the enrollment of himself as a Cherokee freedman.

D 572. By Ella Huddleston, at Chelsea, Indian Territory, on June 7, 1901, for the enrollment of herself and her minor child, Ora L. Huddleston, as Cherokee freedmen.

The evidence herein shows that Maria Hayden, at the beginning of the War of the Rebellion, was the slave of one George Whitmire, a Cherokee citizen, and that she and her daughter, Sarah E., now Sarah E. Buckner, then about eight years old, were taken out of the Cherokee Nation during the war. Henry C. Hayden testifies that he was first married to the said Maria Hayden in 1863, and that he was afterwards married to her in 1873; the second marriage is alleged to

have been in accordance with Cherokee laws. George B. Buckner was married in the State of Kansas to the said Sarah E. Buckner, formerly Sarah E. Hayden, in 1873.

It does not appear that the said Henry C. Hayden or George B. Buckner were slaves or free colored persons residing in the Cherokee Nation at the beginning of the rebellion, and it further appears that the said Maria Hayden was formerly married to one Reuben Still; that she was separated from Reuben Still without a divorce at the time of her last alleged marriage to Henry C. Hayden, and that Reuben Still was then living. Section twenty-one of the act of Congress approved June 28, 1898 (30 Stats., 495), directs this commission to "make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered February third, eighteen hundred and ninety-six."

Arthur, Bessie, and George W. Buckner are the issue of the marriage between George B. and Sarah E. Buckner They take whatever rights may be possessed by their parents. Ella Huddleston is the daughter of said George B. and Sarah E. Buckner, and she and her child, Ora L., take whatever rights may be possessed by the said Sarah E. Buckner.

Andy Rider is the son of one Nancy Still, who, at the beginning of the rebellion, was the slave of one Cook Still, a Cherokee citizen, and that the said Andy Rider was taken out of the Cherokee Nation during the war.

The preponderance of the evidence shows that the said Maria Hayden and her husband, Henry C. Hayden, were residing in the State of Kansas from 1866 up until about 1873, and that they did not remove to and take up their residence in the Cherokee Nation until after that year. Among those returning to the Cherokee Nation with the said Maria Hayden was the said Andy Rider, who appears to have been a member of her family. Sarah E. Buckner was a minor and living with her mother in 1866. She claims to have returned to the Cherokee Nation with her mother, Maria Hayden, and the evidence also shows that the said Sarah E. Buckner resided with her husband in the State of Kansas for eight years or more after their marriage, in 1873.

None of the applicants is identified on the authenticated tribal roll of 1880.

It is therefore the opinion of this commission that the applications for the enrollment of Maria Hayden, Sarah E. Buckner, Arthur Buckner, Bessie Buckner, George W. Buckner, Andy Rider, Ella Huddleston, and Ora L. Huddleston as Cherokee freedmen should be denied under the provisions of section twenty-one of the act of Congress approved June 28, 1898 (30 Stats., 495), and it is so ordered.

It is further the opinion of this commission that under the law above quoted no person is entitled to enrollment as a Cherokee freedman by intermarriage and that the applications for the enrollment of Henry C. Hayden and George B. Buckner as such should be denied, and it is therefore so ordered.

COMMISSION TO THE FIVE CIVILIZED TRIBES.
TAMS BIXBY, *Acting Chairman.*
T. B. NEEDLES, *Commissioner.*
———— ————, *Commissioner.*

Dated at Muskogee, Indian Territory, this August 30, 1902.

I. T. D. 23662–1906. DECEMBER 5, 1906.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

SIR: The department has considered the motion to "amend motion to review" in the Cherokee freedman case of Thomas Bell et al.

The department has already refused several motions in this case, made since May 26, 1904, at which time the department affirmed the decision of the Commission to the Five Civilized Tribes adverse to the applicants.

You recommend that the motion be not granted.

The Indian Office, reporting in the matter November 23, 1906 (land, 91606), states that the affidavits filed in support of the motion are of little value when closely examined, and it concurs in your recommendation. A copy of its letter is inclosed.

The principal applicant, through whom the others claim, stated emphatically in the original testimony that he came from Texas on horseback to the Cherokee Nation by way of Fort Smith, Arkansas, about the fifteenth day of January, 1867, and stayed a few days in the nation, when he returned to Texas, where he has been held as a slave for many years by his Cherokee owner, and that he permanently located with his family in the Cherokee Nation in 1869.

The affidavits now presented, without explanation from Bell on this material point, emphatically contradicts his previous testimony in that it is alleged that Bell, in January, 1867, hired one Aaron Johnson to build him a house on a place in the Cherokee Nation he had selected upon the alleged visit in 1867, and that Bell soon moved into the house and remained in possession for several months. In fact, Houston West attempts to make the impression that Bell took possession of the house and remained continuously therein. Fannie Fields swears that Aaron Johnson built a house for Tom Bell in the month of January, 1867, "and that soon after it was finished said Tom Bell and Hortense Bell, his wife, moved into it, and that they have lived in the Cherokee Nation continuously since then." Bell never pretended, at the original hearing, or in the previous motions, that he took possession of any improvements in the Cherokee Nation in 1867. He alleged that he merely made arrangements on his alleged visit in 1867 to have a house built.

The act of April 26, 1906, provides that the enrollment of Cherokee freedmen shall include only such persons as were "actual personal bona fide residents of the Cherokee Nation August eleventh, eighteen hundred and sixty-six, or who actually returned and established such residence in the Cherokee Nation on or before February eleventh, eighteen hundred and sixty-seven, except as to certain persons hereinafter mentioned."

It is clear that Bell can not meet the requirements of the law. He was not an actual personal bona fide resident of the nation in 1866. Upon such affidavits as are now presented and in view of the previous positive testimony of Bell, the department would not be warranted in ordering a rehearing. The motion is accordingly denied.

The papers in the case have been sent to the Indian Office.

Respectfully,

THOS. RYAN,
First Assistant Secretary.

(Through the Commissioner of Indian Affairs.)

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory, October 9, 1906.

The honorable the SECRETARY OF THE INTERIOR.

SIR: There is transmitted herewith an ""amended motion to review" the Cherokee freedmen consolidated case of Thomas Bell et al., made by Neal & London, attorneys for applicants, Fort Smith, Arkansas. This motion was filed with this office August 13, 1906; service of a copy thereof upon the attorney for the Cherokee Nation is furnished, and the reply of the attorney for the Cherokee Nation, filed August 20, 1906, is also enclosed. There was received June 8, 1906, by departmental reference of June 7, 1906 (received in department June 5, 1906, I. T. D. 6335), a communication from Thomas Bell, the principal applicant in this case, dated June 1, 1906, in reference to securing a rehearing in his case. Under date of July 23, 1906, Thomas Bell was advised that his communication would be treated as a motion for rehearing in his case; that sufficient reason was not contained therein to warrant a favorable recommendation to the department that a rehearing be granted him; that his communication did not meet the usual requirements of motions for rehearing, and that he would be allowed twenty days from date within which to file a proper motion for a rehearing, and was informed of the things necessary to do in the premises.

The decision of the Commission to the Five Civilized Tribes, dated April 20, 1904, rejecting the applicants embraced in the Cherokee freedmen consolidated case of Thomas Bell et al., was affirmed by the department May 26, 1904 (I. T. D. 4050–1904). January 16, 1905 (I. T. D. 12064–1904), the department denied a motion made by Messrs. Neal & London for a rehearing in this case; on September 22, 1906 (I. T. D. 4228–1905), the department denied a motion "to reverse the decision of the Commission to the Five Civilized Tribes" rejecting the applicants in said case, and on September 25, 1906 (I. T. D. 8831–1905), the department denied a motion filed September 7, 1905, for review of said case.

It is requested in the motion that in the event the decision adverse to the applicants in the case is not reversed on review, the case be reopened and applicants allowed to introduce "the witnesses whose affidavits are hereto attached, and such other material testimony as at such new hearing they may be able to adduce." There is nothing in the motion to show to what motion it is intended to be an amendment. If the motion is intended to be an amendment to the one denied by the department September 22, 1906, or the one denied by the department September 25, 1906, there is no merit to the same, and it should be denied.

The attorneys who filed the motion now under consideration filed the motion for a rehearing which was denied by the department January 16, 1905, and were advised thereof long prior to filing this amended motion. This amended motion considered in connection with the communication above referred to of Thomas Bell, and with the record of proceedings had in the case, is not shown to be of any merit.

The motion made by Neal & London, which was denied by the department January 16, 1905, appears to not have been transmitted to the department through this office, but from the department's

letter it appears that the evidence sought to be introduced in that motion is practically the same as the evidence which the attorneys are seeking an opportunity to now introduce, their amended motion being supported by affidavits of Clint Scales, Huston West, and Fannie Fields. There is nothing material in the communication of Thomas Bell which has not heretofore been considered in connection with this case. It is therefore respectfully recommended that the motion for a rehearing in the Cherokee freedman case of Thomas Bell et al. be denied.

Respectfully,

(Signed) TAMS BIXBY, *Commissioner.*

(Through the Commissioner of Indian Affairs.)

I. T. D. 8831–1905.

SEPTEMBER 25, 1906.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

SIR: In conformity with departmental action of September 22, 1906 (I. T. D. 4050, 12064–04, 4228–05), denying a motion for a rehearing in the matter of the application of Thomas Bell et al., for enrollment as Cherokee freedmen, the department hereby denies a motion for review in said case, filed with the department on September 7, 1905, by Messrs. McGowan, Serven and Mohan, on behalf of the applicants.

The motion has been returned this day to the Commissioner of Indian Affairs for the files of his office.

Respectfully,

JESSE E. WILSON,
Assistant Secretary.

(Through the Commissioner of Indian Affairs.)

I. T. D. 4050–1904, 12064–1904, 4228–1905.

SEPTEMBER 22, 1906.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

SIR: The department has carefully considered, in connection with the original record and supplemental affidavits filed in support thereof, a motion "to reverse the decision of the commission to the Five Civilized Tribes" of April 20, 1904, rejecting the applications for the enrollment of Thomas Bell et al. as Cherokee freedmen, affirmed by the department May 26, 1904 (I. T. D. 4050).

January 16, 1905 (I. T. D. 12064), the department denied a motion for rehearing in the above case, on the ground that the evidence failed to show that there was any act of principal applicant establishing a bona fide residence in the Cherokee Nation prior to February 11, 1867. No additional evidence has been filed in the case since the denial of the motion for a rehearing.

In view of the provision of section 3 of the act of Congress approved April 26, 1906 (34 Stat., 137), providing for the enrollment of Cherokee freedmen "who actually returned and established such residence in

the Cherokee Nation on or before February 11, 1867," and applicant having failed to establish any such residence, said "motion to reverse" is hereby denied, and the department still adheres to its decision of May 26, 1904 (I. T. D. 4050), rejecting said application.

You will advise Messrs. Neal & London, attorneys, of South McAlester, Ind. T., of this action.

The record and papers filed on motion for rehearing have this day been returned for the files of the Indian Office.

Respectfully,

JESSE E. WILSON,
Assistant Secretary.

(Through the Commissioner of Indian Affairs.)

I. T. D. 4050–1904, 12064–1904.

DEPARTMENT OF THE INTERIOR,
Washington, January 16, 1905.

COMMISSIONER OF INDIAN AFFAIRS.

SIR: Referring to the acting commissioner's letter of November 26, 1904 (Land 81114–1904), there is inclosed departmental letter to be forwarded to the commission to the Five Civilized Tribes, advising it of the denial of a motion for rehearing in the Cherokee freedman case of Thomas Bell et al.

All the papers in the case are inclosed.

Respectfully,

(Signed) M. C. MILLER,
Assistant Secretary.

I. T. D. 4050–1904, 12064–1904.

JANUARY 16, 1905.

COMMISSION TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

GENTLEMEN: The department has considered a motion for rehearing in the Cherokee freedman case of Thomas Bell et al., and in connection therewith the record in the case.

May 26, 1904, the department affirmed your decision rejecting the applicants.

The principal applicant, through whom the others claim, wholly failed to establish his claim of having returned to the Cherokee Nation within the time fixed by the treaty of 1866.

The nation submitted competent evidence to show that Thomas Bell (who had lived for perhaps twenty years prior to the Civil War on his Cherokee master's farm in Texas), did not leave the State of Texas prior to the spring of 1867.

Bell claims to have been in the Cherokee Nation early in January, 1867, alleging that he came on horseback, and that he "selected a location." He stated that he only remained a few days and then returned to Texas, and did not again return to the nation until 1869, when he brought his family.

He seeks by the present motion, which is corroborated by affidavits of two persons, an opportunity to show that he was in the nation

before February 11, 1867, and that he made a contract for the building of a house, apparently supposing that this would entitle him to enrollment.

Admitting that this could be shown, it would not be sufficient. There seems to be no question that his residence was continuous in Texas until 1869, and that if he ever was in the Cherokee Nation prior to that time there was no act establishing a bona fide residence in the nation. The motion for rehearing is accordingly denied.

The motion appears to have been filed by Messrs. Neal and London, of Fort Smith, Arkansas. It is requested that you advise them of the action taken.

Respectfully, THOS. RYAN, *Acting Secretary.*

I. T. D. 4050–1904, 4447–1904.

DEPARTMENT OF THE INTERIOR,
Washington, June 3, 1904.

COMMISSIONER OF INDIAN AFFAIRS.

SIR: There is enclosed herewith departmental letter to be forwarded to the Commission to the Five Civilized Tribes, denying a motion for rehearing, filed by Nancy Ann Lewis, in the matter of her application for enrollment as a Cherokee freedman.

Said motion for rehearing is enclosed herewith, to be filed with the papers in the case.

Respectfully, (Signed) THOS. RYAN,
Acting Secretary.

I. T. D. 4050–1904, 4447–1904.

JUNE 3, 1904.

COMMISSION TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

GENTLEMEN: The department is in receipt of a petition, filed by Nancy Ann Lewis, of Fort Smith, Arkansas, for a rehearing in the matter of her application for enrollment of herself and two children as Cherokee freedmen.

The case was acted upon in letter to you of May 26, 1904, and your decision rejecting the application was affirmed.

The main ground upon which the request for rehearing is based is alleged newly-discovered evidence, but the name of only one person is given who, it is claimed, would testify that the father of the principal applicant, through whom she claims, returned to the Cherokee Nation within the time required by the treaty of 1866.

Motions for rehearings, based upon allegations of newly-discovered evidence, should be supported by the affidavits of the witnesses who will testify to the alleged newly-discovered evidence, setting forth specifically what the testimony will show. This petition does not answer these requirements. It is not even sworn to, and is not corroborated. Besides, it does not state the time of the discovery of the evidence, nor does it appear that the petitioner has acted without unnecessary delay.

The motion is denied, and you will so advise the party.

Respectfully,

THOS. RYAN, *Acting Secretary.*

I. T. D. 4050–1904.

MAY 26, 1904.

COMMISSION TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

GENTLEMEN: May 4, 1904, you transmitted the record in the consolidated Cherokee freedman case of Thomas Bell, et al. (R–188, et al.), including your decision of April 20, 1904, rejecting the applications for the enrollment of Thomas, Tensie, Arthur, George C., and Effie Bell, Emily Janes, Loretta and Jessie May Brown, Nancy Ann, Georgeanna and Tennessee Lewis, and Benny and Mattie Williams.

Reporting in the matter May 17, 1904, the Acting Commissioner of Indian Affairs recommends that your decision be approved. A copy of his letter is inclosed.

The department concurs in said recommendation, and your decision is accordingly affirmed.

Respectfully, THOS. RYAN, *Acting Secretary.*

DEPARTMENT OF THE INTERIOR,
Commission to the Five Civilized Tribes.

Cherokee Freedmen, R. 188, et al.

MUSKOGEE, INDIAN TERRITORY, *May 4, 1904.*

The honorable the SECRETARY OF THE INTERIOR.

SIR: There is herewith transmitted the record of proceedings had in the consolidated case of Thomas Bell et al., including the commission's decision, dated April 20, 1904, rejecting the applications for the enrollment of Thomas, Tensie, Arthur, George C., and Effie Bell; Emily Jane, Loretta, and Jessie May Brown; Nancy Ann, Georgeanna, and Tennessee Lewis, and Benny and Mattie Williams as Cherokee freedmen.

Respectfully,

(Signed) TAMS BIXBY,
Chairman.

(Through the Commissioner of Indian Affairs.)

DEPARTMENT OF THE INTERIOR.

COMMISSION TO THE FIVE CIVILIZED TRIBES.

In the matter of the application for the enrollment of Thomas Bell et al., as Cherokee freedmen, consolidating the applications of—

Thomas Bell et al., Cherokee freedmen R–188.
George C. Bell et al., Cherokee freedmen R–192.
Emily Jane Brown et al., Cherokee freedmen R–193.
Nancy Ann Lewis et al., Cherokee freedmen R–194.
Benny Williams et al., Cherokee freedmen R–195.

DECISION.

The record herein shows that applications for enrollment as Cherokee freedmen were made to this commission by Thomas Bell for himself, his wife, Tensie Bell, and his minor child, Arthur Bell; by George C. Bell for himself and his minor child, Effie Bell; by

Emily Jane Brown for herself and her minor children, Loretta and Jessie May Brown; by Nancy Ann Lewis for herself and her minor children, Georgeanna and Tennessee Lewis, and by Sandy Williams for his minor children, Nenny and Mattie Williams.

The evidence in this case shows that the applicant, Thomas Bell, was the slave of a Cherokee citizen at the commencement of the rebellion; that during said rebellion he was taken out of the Cherokee Nation and did not return thereto and establish a residence therein within the time specified in the decree of the Court of Claims rendered on February 3, 1896, in the case of Moses Whitmire, trustee, etc., *v.* the Cherokee Nation et al., for the return of Cherokee freedmen to said nation. The evidence further shows that the applicant, Tensie Bell, was at one time the slave of a Cherokee citizen who removed to the State of Texas several years prior to the rebellion, taking the applicant, Tensie Bell, with him, and established a residence in said State; that the said Tensie Bell did not return to the Cherokee Nation and establish a residence therein within the time specified in the decree of said Court of Claims. The other applicants, Arthur Bell, George C. Bell, Effie Bell, Emily Jane Brown, Loretta Brown, Jessie May Brown, Nancy Ann Lewis, Georgeanna Lewis, Tennessee Lewis, Benny Williams, and Mattie Williams, have been born since 1866 and are the children and grandchildren of the said Thomas Bell and his wife, Tensie Bell, and have no right to enrollment except such as they have acquired through the said Thomas Bell and Tensie Bell.

It does not appear that any of the applicants herein are identified on the 1880 authenticated Cherokee roll.

It is therefore the opinion of this commission that the applications for the enrollment of Thomas Bell, Tensie Bell, Arthur Bell, George C. Bell, Effie Bell, Emily Jane Brown, Loretta Brown, Jessie May Brown, Nancy Ann Lewis, Georgeanna Lewis, Tennessee Lewis, Benny Williams, and Mattie Williams as Cherokee freedmen should be denied under the provisions of section twenty-one of the act of Congress approved June 28, 1898 (30 Stat., 495), and it is so ordered.

COMMISSION TO THE FIVE CIVILIZED TRIBES.
TAMS BIXBY, *Chairman.*
THOMAS B. NEEDLES, *Commissioner.*
C. R. BRECKINRIDGE, *Commissioner.*
———— ————, *Commissioner.*

MUSKOGEE, *Indian Territory.*
This April 20, 1904.

I. T. D. 4880–1904.

DEPARTMENT OF THE INTERIOR,
Washington, June 21, 1904.

COMMISSIONER OF INDIAN AFFAIRS.

SIR: Referring to the acting commissioner's communication of June 13, 1904 (Land 31088–1904), there is enclosed herewith departmental letter to be forwarded to the Commission to the Five Civilized Tribes, affirming its decision rejecting the applications of Sallie Mayfield et al. for enrollment as Cherokee freedmen.

The papers in the case are returned herewith.

Respectfully,

(Signed) E. A. HITCHCOCK,
Secretary.

I. T. D. 4880–1904. JUNE 21, 1904.

COMMISSION TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

GENTLEMEN: May 5, 1904, you transmitted the record in the consolidated case embracing the applications of Sallie Mayfield et al. (F. D.–91 et al.), for enrollment as Cherokee freedmen, including your decision of April 20, 1904, rejecting the applications for the enrollment of Sallie, Thomas, Milert, Houston, John, Cornelia, Fannie, Hattie, Emmett, Thomas, Leonard, Emberry, and Sallie Mayfield.

Reporting June 13, 1904, the Acting Commissioner of Indian Affairs recommends that your decision be approved. A copy of his letter is inclosed.

The department concurs in said recommendation, and your decision, in so far as it rejects the applicants, is affirmed.

Respectfully,

E. A. HITCHCOCK, *Secretary.*

Cherokee freedmen D–91 et al.

DEPARTMENT OF THE INTERIOR,
COMMISSION TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory, May 5, 1904.

The honorable the SECRETARY OF THE INTERIOR.

SIR: There is herewith transmitted the record of proceedings had in the consolidated case of Sallie Mayfield et al., including the commission's decision, dated April 20, 1904, rejecting the applications for enrollment of Sallie, Thomas, Milert, Houston, John, Cornelia, Fannie, Hattie, Emmett, Thomas, Leonard, Emberry, and Sallie Mayfield as Cherokee freedmen.

Respectfully,

(Signed) T. B. NEEDLES,
Commissioner in Charge.

(Through the Commissioner of Indian Affairs.)

DEPARTMENT OF THE INTERIOR,

COMMISSION TO THE FIVE CIVILIZED TRIBES.

In the matter of the application for the enrollment of Sallie Mayfield et al., as Cherokee freedmen, consolidating the applications of—
Sallie Mayfield, Cherokee freedmen, D–91.
Thomas Mayfield et al., Cherokee freedmen, D–124.
Emberry Mayfield et al., Cherokee freedmen, D–131.

DECISION.

The record herein shows that application for enrollment as Cherokee freedmen were made to this commission by Sallie Mayfield for herself; by Thomas Mayfield for himself, his wife, Ella Mayfield, and his minor children, Milert, Houston, John, Cornelia, Fannie, Hattie, Emmett, Thomas, and Leonard Mayfield; the said Ella Mayfield claims only as

an intermarried freedman, and her rights are not passed on in this decision; and by Emberry Mayfield for himself and his minor daughter, Sallie Mayfield. A copy of the testimony of Mark Bean and L. B. Bell, in Cherokee freedmen, D–43, and a copy of the testimony of W. T. Harnage, Ezekiel Harnage, and D. M. Falkner, in Cherokee Freedmen, D–989, taken at Fort Gibson, Indian Territory, September 4, 1901, are filed herewith and made a part of the record in this case.

The evidence herein shows that the Sallie Mayfield and Thomas Mayfield first mentioned above are mother and son, and that they were both at one time the slaves of one Sallie Mayfield, who was a Cherokee citizen but who, prior to the commencement of the rebellion, removed to the State of Texas, taking these two applicants with her, and established a residence in said State; that the applicants, Milert, Houston, John, Cornelia, Fannie, Hattie, Emmett, Thomas, and Leonard Mayfield, are the minor children of the said Thomas Mayfield, first mentioned above, and claim their right to enrollment through him; that the said Emberry Mayfield is a son of the said Sallie Mayfield first mentioned above, was born since the commencement of the rebellion, and therefore claims his right to enrollment through his mother, and the said Sallie Mayfield is the minor daughter of said Emberry Mayfield, and claims her right to enrollment through her father.

It further appears from the evidence herein that neither the said Sallie Mayfield nor Thomas Mayfield first mentioned above returned to and established a residence in the Cherokee Nation within the time specified in the decree of the Court of Claims rendered on February 3, 1896, in the case of Moses Whitmire, trustee, etc., *v.* The Cherokee Nation et al, for the return of Cherokee freedmen to said nation.

It further appears that the names of none of the applicants herein appear upon the 1880 authenticated Cherokee roll.

It is, therefore, the opinion of this commission that the applications for the enrollment of Sallie Mayfield, Thomas Mayfield, her son; Milert Mayfield, Houston Mayfield, John Mayfield, Cornelia Mayfield, Fannie Mayfield, Hattie Mayfield, Emmett Mayfield, Thomas Mayfield and Leonard Mayfield, the children of said Thomas Mayfield; Emberry Mayfield and his daughter, Sallie Mayfield, as Cherokee freedmen, should be denied, under the provisions of section twenty-one of the act of Congress, approved June 28, 1898 (30 Stat., 495), and it is so ordered.

COMMISSION TO THE FIVE CIVILIZED TRIBES.
TAMS BIXBY, *Chairman.*
THOMAS B. NEEDLES, *Commissioner.*
C. R. BRECKINRIDGE, *Commissioner.*
———, *Commissioner.*

MUSKOGEE, *Indian Territory, April 20, 1904.*

DEPARTMENT OF THE INTERIOR,
Washington, October 29, 1904.

I. T. D. 10614–1904.

COMMISSIONER OF INDIAN AFFAIRS.

SIR: Referring to the acting commissioner's letter of October 15, 1904 (Land 19276–1904), there is inclosed departmental letter to be

forwarded to the Commission to the Five Civilized Tribes affirming its decision rejecting the application of Elijah Watie for enrollment as a Cherokee freedman.

The papers in the case are returned herewith.

Respectfully,

(Signed) M. W. MILLER,
Assistant Secretary

I. T. D. 10614–1904.

OCTOBER 29, 1904.

COMMISSION TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

GENTLEMEN: March 16, 1904, you transmitted the record in the matter of the application of Elijah Watie for enrollment as a Cherokee freedman, including your decision of March 5, 1904, rejecting said application.

Reporting in the matter October 16, 1904, the Acting Commissioner of Indian Affairs recommends that your decision be approved. A copy of his letter is inclosed.

The department concurs in said recommendation, and your decision is hereby affirmed.

Respectfully,

E. A. HITCHCOCK,
Secretary.

Cherokee F. D–921.

DEPARTMENT OF THE INTERIOR,
COMMISSION TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory, March 16, 1904.

The honorable the SECRETARY OF THE INTERIOR.

SIR: There is herewith transmitted the record of proceedings had in the matter of the application of Elijah Watie for enrollment as a Cherokee freedman, including the commission's decision, dated March 5, 1904, rejecting said application.

Respectfully,

(Signed) T. R. BRECKINRIDGE,
Commissioner in Charge.

(Through the Commissioner of Indian Affairs.)

Cherokee freedmen D–921.

DEPARTMENT OF THE INTERIOR,

COMMISSION TO THE FIVE CIVILIZED TRIBES.

In the matter of the application for the enrollment of Elijah Watie as a Cherokee freedman.

DECISION.

The evidence in this case shows that on June 28, 1901, Elijah Watie appeared before the commission at Nowata, Indian Territory, and made application for the enrollment of himself as a Cherokee freedman. Further proceedings in the matter of said application were

had at Vinita, Indian Territory, on October 2, October 7, and October 23, 1901.

It does not appear from the evidence that the applicant was the slave of a Cherokee citizen or a free colored person residing in the Cherokee Nation at the commencement of the rebellion.

The name of the applicant is not found on the 1880 authenticated roll of the Cherokee Nation.

It is, therefore, the opinion of this commission that the application for the enrollment of Elijah Watie as a Cherokee freedman should be denied, under the provisions of section twenty-one of the act of Congress approved June 28, 1898 (30 Stats., 495), and it is so ordered.

COMMISSION TO THE FIVE CIVILIZED TRIBES.
TAMS BIXBY, *Chairman.*
THOMAS B. NEEDLES, *Commissioner.*
C. R. BRECKINRIDGE, *Commissioner.*
W. E. STANLEY, *Commissioner.*

MUSKOGEE, INDIAN TERRITORY, *March 5, 1904.*

I. T. D. 5034–1904.

DEPARTMENT OF THE INTERIOR,
Washington, June 25, 1904.

COMMISSIONER OF INDIAN AFFAIRS.

SIR: Referring to the acting commissioner's communication of June 17, 1904 (Land 20530–1904), there is inclosed herewith departmental letter to be forwarded to the Commission to the Five Civilized Tribes, affirming its decision rejecting the application for the enrollment of Esther Holt as a Cherokee freedman.

The papers in the case are returned herewith.

Respectfully,

M. W. MILLER,
Acting Secretary.

I. T. D. 5034–1904. JUNE 25, 1904.

COMMISSION TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

GENTLEMEN: March 24, 1904, you transmitted the record in the matter of the application of Esther Holt (F. D–645), for enrollment as a Cherokee freedman, including your decision of March 5, 1904, rejecting said application.

Reporting June 17, 1904, the Acting Commissioner of Indian Affairs recommends that your decision be approved. A copy of his letter is inclosed herewith.

The department concurs in said recommendation, and your decision is hereby affirmed.

Respectfully,

M. W. MILLER, *Secretary.*

Cherokee freedmen, D 645.

DEPARTMENT OF THE INTERIOR,
COMMISSION TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory, March 24, 1904.

The honorable the SECRETARY OF THE INTERIOR.

SIR: There is herewith transmitted the record of proceedings had in the matter of the application of Esther Holt for the enrollment of herself as a Cherokee freedman, including the commission's decision dated March 5, 1904, rejecting said application.

Respectfully,

T. B. NEEDLES,
Commissioner in Charge.

(Through the Commissioner of Indian Affairs.)

Cherokee freedmen, D 645.

DEPARTMENT OF THE INTERIOR,
COMMISSION TO THE FIVE CIVILIZED TRIBES.

In the matter of the application of Esther Holt for enrollment as a Cherokee freedman.

DECISION.

The record in this case shows that on June 10, 1901, Esther Holt appeared before the commission at Chelsea, Indian Territory, and made personal application for enrollment as a Cherokee freedman. Copies of the testimony taken at various times in the cases of Joshua Holt et al. and Sallie Miller are made a part of the record herein.

The evidence shows that the applicant, Esther Holt, was the slave of a Cherokee citizen at the commencement of the rebellion; that during the rebellion she left the Cherokee Nation and did not return thereto within the time specified in the decree of the Court of Claims rendered on February 3, 1896, in the case of Moses Whitmire, trustee, etc. *vs.* The Cherokee Nation et al., for the return of freedmen to said nation.

The name of said applicant is not found on the 1880 authenticated roll of said nation.

It is therefore the opinion of this commission that the application of Esther Holt for enrollment as a Cherokee freedman should be denied, under the provisions of section 21 of the act of Congress approved June 28, 1898 (30 Stats., 495), and it is so ordered.

COMMISSION TO THE FIVE CIVILIZED TRIBES.
TAMS BIXBY, *Chairman.*
T. B. NEEDLES, *Commissioner.*
C. R. BRECKINRIDGE, *Commissioner.*
W. E. STANLEY, *Commissioner.*

MUSKOGEE, INDIAN TERRITORY, *Mar. 5, 1904.*

I. T. D. 7158, 9610–1905; 9876, 10388–1905.

DEPARTMENT OF THE INTERIOR,
Washington, July 10, 1906.

COMMISSIONER OF INDIAN AFFAIRS.

SIR: Referring to your office letter of June 13, 1905 (Land 37642), there is inclosed departmental letter to be forwarded to the Commissioner to the Five Civilized Tribes, affirming the decision of the Commission to the Five Civilized Tribes of May 13, 1905, rejecting the application for the enrollment of Joann Taylor et al. as Cherokee freedmen.

The papers in the matter are inclosed for the files of your office.

Respectfully,

JESSE E. WILSON,
Assistant Secretary.

I. T. D. 7158, 9610–1905; 9876, 10388–1905.

JULY 10, 1906.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

SIR: May 13, 1905, the Commission to the Five Civilized Tribes transmitted the record in the matter of the application for the enrollment of Joann Taylor, Paralee Albert, and King, Matthew, Robert, Mary, Equilla, Mattie, and Paralee David as Cherokee freedmen.

Reporting June 13, 1905, the Indian Office recommended that the commission's decision, adverse to all the applicants, be approved. A copy of its letter is enclosed.

The attorneys for the applicants filed a motion for a rehearing and brief in support of said motion. The attorneys for the nation filed a protest against the granting of the motion for a rehearing.

The motion and arguments have been considered in connection with the record in the case, and it is considered that the decision of the commission is correct. Said decision is hereby affirmed.

Respectfully,

J. E. W., *Assistant Secretary.*

Refer in reply to the following: Cherokee Freedman, D–778.

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory, July 29, 1905.

The honorable the SECRETARY OF THE INTERIOR.

SIR: There is transmitted herewith protest on behalf of the Cherokee Nation against granting the motion of applicants to reopen the Cherokee freedman enrollment case of Joanna Taylor et al. (F. D–778 et al.).

The record of proceedings had in this case, including the decision of the Commission to the Five Civilized Tribes rejecting the applicants embraced in said case, was forwarded to the department on May 13, 1905.

Respectfully,

TAMS BIXBY, *Commissioner.*

(Through the Commissioner of Indian Affairs.)

Cherokee Freedmen, D–778, et al.

DEPARTMENT OF THE INTERIOR,
COMMISSION TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory, May 13, 1905.

The honorable the SECRETARY OF THE INTERIOR.

SIR: There is herewith transmitted the record of proceedings had in the matter of the application for the enrollment of Joann Taylor et al., as Cherokee freedmen, including the commission's decision dated May 13, 1905, rejecting said application.

Respectfully,

TAMS BIXBY, *Chairman.*

(Through the Commissioner of Indian Affairs.)

DEPARTMENT OF THE INTERIOR.

COMMISSION TO THE FIVE CIVILIZED TRIBES.

In the matter of the application of Joann Taylor et al., for enrollment as Chreokee freedmen, consolidating the applications of—
Joann Taylor, Cherokee Freedmen D–778.
Paralee Albert, Cherokee Freedmen D–1084.
King David et al., Cherokee Freedmen D–1085.

DECISION.

The record herein shows that applications for enrollment as Cherokee freedmen were made to this commission by Joann Taylor for herself; by Paralee Albert for herself; and by King David for himself and his minor children, Matthew, Robert, Mary, Equilla, Mattie, and Paralee David. Application was also made for the enrollment of Laura David as a Cherokee freedman by intermarriage, but as the status of such persons is not fixed at this time her rights are not passed upon nor is she embraced in this decision.

The evidence herein shows that Joann Taylor was the slave of a Cherokee citizen at the commencement of the rebellion and that she remained in the Cherokee Nation during said rebellion and was residing therein during the time necessary for the acquisition of freedmen rights under article nine of the Cherokee treaty of 1866; that soon thereafter she removed to and become a citizen of the State of Arkansas, where she remained for a period of about twenty years, when she returned to the Cherokee Nation, where she has since resided. It is further shown that during her residence in Arkansas she owned no property of any description in the Cherokee Nation.

Section two, article one, of the Cherokee constitution provides that—

"* * * whenever any citizen shall remove with his effects out of the limits of this nation, and becomes a citizen of any other government, all his rights and privileges as a citizen of this nation shall cease. * * *"

The evidence further shows that the other applicants herein are the children and grandchildren of the said Joann Taylor, born since the commencement of the rebellion, and possess no rights to enrollment except such as they acquire through the said Joann Taylor.

None of the applicants herein are identified on the Cherokee authenticated tribal roll of 1880.

It is, therefore, the opinion of this commission that the applications for the enrollment of Joann Taylor, Paralee Albert, King David, Matthew David, Robert David, Mary David, Equilla David, Mattie David, and Paralee David as Cherokee freedmen should be denied, under the provisions of section twenty-one of the act of Congress approved June 28, 1898 (30 Stats., 495), and it is so ordered.

COMMISSION TO THE FIVE CIVILIZED TRIBES.
TAMS BIXBY, *Chairman.*
T. B. NEEDLES, *Commissioner.*
C. R. BRECKINRIDGE, *Commissioner.*

Dated at Muskogee, Indian Territory, this May 13, 1905.

I. T. D. 5620–1907.

DEPARTMENT OF THE INTERIOR,
Washington, March 1, 1907.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

SIR: The motion for rehearing in the Cherokee freedman case of Esau Fox et al., filed on behalf of Maggie and Emma Willis, applicants therein, received with your letter of February 12, 1907, and Indian Office letter of February 26, 1907 (Land, 14346–07), is hereby denied, in accordance with your recommendation and that of the Indian Office, and in view of the limited time allowed by the provision in section 2 of the act of April 26, 1906 (34 Stat., 137), for the completion of the rolls of citizens of the Five Civilized Tribes.

A copy hereof and the papers in the matter have been sent to the Indian Office.

Respectfully,

JESSE E. WILSON,
Assistant Secretary.

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory, February 12, 1907.

The honorable the SECRETARY OF THE INTERIOR.

SIR: June 23, 1906, there was filed with the commissioner by Roy T. Osborn, attorney, Coffeyville, Kansas, and W. J. Sullivan, attorney, Muskogee, Indian Territory, a motion made by Jake and Frank Looney for a rehearing of their Cherokee freedmen enrollment cases. This motion is a carbon copy of a motion which is shown to have been sent to the department and which was referred by the department to the commissioner for report and recommendation on July 7, 1906 (I. T. D. 7621–1906). Said motion is also enclosed. July 1, 1906, the attorney for the Cherokee Nation filed a protest against this motion being granted, and on September 19, 1906, attorneys for applicants filed a reply to the nation's protest. Both of said documents are also enclosed.

The decision of the Commission to the Five Civilized Tribes, dated March 5, 1904, rejecting, among others, the application for the enrollment of Jake and Frank Looney, was affirmed by the department August 31, 1904 (I. T. D. 6756–1904). Their applications are embraced in the consolidated Cherokee freedmen case of Esau Fox et al.

The motion under consideration is based upon "newly discovered" evidence, and is only supported by the affidavit of Emma Campbell, a sister of said applicants, Jake and Frank Looney. It is not shown that the applicants used any diligence in endeavoring to secure the testimony of their sister, and it would not appear that with the exercise of any degree of diligence her testimony could not have been secured when the case was tried before the commission. The record shows that she only lives a few miles from these applicants.

There appears to be no merit to the motion, and it is respectfully recommended that the same be denied.

Reference is made to departmental letter of June 16, 1906 (I. T. D. 4718–1905), denying a motion filed on behalf of Joseph Ross et al., applicants in the consolidated case of Esau Fox et al., for a reopening of said case, in which the department denied said motion, and stated "the department has carefully reviewed the entire original record with the affidavits filed on motion for reopening in said case, and finds no reason to disturb its decision of August 31, 1904, to which the department still adheres."

Respectfully,

TAMS BIXBY, *Commissioner.*

(Through the Commissioner of Indian Affairs.)

I. T. D. 23256–1906, 24876–1906, 1866–1907, 11983–1906.

DEPARTMENT OF THE INTERIOR,
Washington, February 12, 1907.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

SIR: On December 10, 1906 (Land 102978–06), the Indian Office transmitted your report dated November 20, 1906, relative to "311 motions in Cherokee freedmen cases" and referring particularly to the consolidated case of Esau Fox et al.

You recommend that as these motions have no merit they should be denied.

On January 26, 1906 (Land 111204–06), the Indian Office also transmitted your report dated December 18, 1906, in the matter of a motion for rehearing filed on behalf of Maggie Willis and Emma Willis, applicants in the consolidated case of Esau Fox et al.

You do not consider that there is anything material in this motion and you recommend that it be denied.

The Indian Office concurs in your recommendation. A copy of its letter is inclosed.

On July 7, 1906, the department forwarded for your consideration a motion for rehearing filed on behalf of Jake Looney et al., who is also a party applicant in this case.

In view of section 2 of the act of April 26, 1906 (34 Stat., 137), even if these motions presented a prima facie case, the department would not now be warranted in granting a rehearing.

All motions for rehearing are accordingly denied.

The papers are inclosed for the files of the Indian Office, together with a carbon copy hereof.

Respectfully,

THOS. RYAN,
First Assistant Secretary.

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory, December 24, 1906.

The honorable the SECRETARY OF THE INTERIOR.

SIR: There is transmitted herewith a motion filed June 25, 1906, by David Ross for a rehearing of his Cherokee freedman case. It bears no evidence of a copy thereof having been served on the attorney for the Cherokee Nation, and is unsupported by affidavits.

August 31, 1904 (I. T. D., 6756–1904), the department affirmed the decision of the Commission to the Five Civilized Tribes, dated March 5, 1904, rejecting, among others, the application of David Ross for enrollment as a Cherokee freedman. A motion for review of said case filed September 7, 1905, was denied by the department May 2, 1906. A motion for a rehearing of the consolidated case of Flora Murrell et al., including the case of David Ross, filed March 16, 1905, was denied by the department June 16, 1906 (I. T. D. 2549, 4718–1905), the department stating that it "has carefully reviewed the entire original record, with the affidavits filed on motion for rehearing in said case, and finds no reason to disturb its decision of August 31, 1904, to which the department still adheres."

The motion presents no question not heretofore considered, and as it is without merit, it is respectfully recommended that the same be denied.

Respectfully, (Signed) TAMS BIXBY,
Commissioner.

(Through the Commissioner of Indian Affairs.)

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory, December 18, 1906.

The honorable the SECRETARY OF THE INTERIOR.

SIR: There is transmitted herewith a motion filed June 25, 1906, by George Campbell, Coffeyville, Kansas, for a rehearing of the Cherokee freedman cases of Maggie Willis et al., Emma Willis (Brown), et al., and Chaney Ross. No evidence is furnished of a copy of this motion having been served on the attorney for the Cherokee Nation.

The decision of the Commission to the Five Civilized Tribes rejecting, among others, the application for the enrollment of Chaney Ross, Maggie Willis and son Lloyd Willis, and Emma Brown and son, Steve Willis, as Cherokee freedmen, was affirmed by the department August 31, 1904 (I. T. D. 6756–1904). These claimants

were embraced in the Cherokee Freedmen consolidated case of Flora Murrell and Esau Fox, et al., in which case the department, on June 16, 1906 (I. T. D. 2549, 4718–1905), denied a motion for rehearing.

There is nothing material to the motion herewith transmitted which has not heretofore been considered in connection with the case, and as there is no merit to the same, it is respectfully recommended that it be denied.

Respectfully,

TAMS BIXBY, *Commissioner.*

(Through the Commissioner of Indian Affairs.)

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory, November 20, 1906.

The honorable the SECRETARY OF THE INTERIOR.

SIR: January 15, 1906 (I. T. D. 8297–8337–8957, inclusive; odd numbers 1905–460–1906), the department forwarded this office a copy of an approved opinion of the Assistant Attorney General, dated January 10, 1906, "relative to 311 motions in Cherokee freedmen cases;" also copy of a schedule of names of claimants in said cases furnished by the attorneys filing the motions, and a copy of the letter of said attorneys, and of departmental letter to said attorneys.

The Assistant Attorney General, in his opinion, states that "the numeral memorandum at head of the reference (copied at head hereof) indicates that the motions involved seven hundred and twenty-two cases, though the motions referred to me numbered but three hundred and eleven."

The records of this office have been made to show that motions were filed September 7, 1905, the date of the filing with the department, in all of the cases included in the copy of schedule of names furnished this office by the department January 15, 1906.

A great many of these motions were denied by the department in its two letters to this office, dated May 2, 1906. (I. T. D. 8347, 8705, and I. T. D., no number.)

Among the cases included in said copy of schedule are all the cases embraced in the Cherokee freedmen consolidated case of Esau Fox et al., except Allen Looney et al., D. 551, and Jake Looney et al., D. 573, in which the decision of the Commission to the Five Civilized Tribes, dated March 5, 1904, adverse to all of the applicants except Flora Murrell, was affirmed by the department August 31, 1904. (I. T. D. 6756–1904.)

Among the cases in which motions for review were filed September 7, 1905, and were denied by the department May 2, 1906 (I. T. D. 8347, 8705–1905), was that of Maggie Willis et al., D. 936, which case was consolidated with that of Esau Fox.

So far as this office is informed, all of the motions filed September 7, 1906, were simply based upon an alleged misconstruction of the treaty of July 19, 1866, relative to the return to the Cherokee Nation of Cherokee freedmen. The records fail to show that said motions in the consolidated case of Esau Fox et al., except the one filed in

the case of Maggie Willis et al., have been acted upon by the department, and in view of paragraph 2 of section 3 of the act of Congress approved April 26, 1906 (Stat., 137), it appears that there is no merit to the motions, and it is respectfully recommended that they be denied.

June 16, 1906 (I. T. D. 6756–1904, 2549–4718–1905), the department denied a motion filed March 16, 1905, on behalf of Joseph Ross et al. for a rehearing of the consolidated applications of Flora Murrell et al. (Esau Fox et al.).

Respectfully,

TAMS BIXBY,
Commissioner.

(Through the Commissioner of Indian Affairs.)

DEPARTMENT OF THE INTERIOR,
Washington, November 3, 1906.

I. T. D. 6756–1906.

COMMISSIONER OF INDIAN AFFAIRS.

SIR: For the consideration of a motion for a reopening filed on behalf of Eliza Looney, an applicant in the consolidated Cherokee freedman case of Esau Fox et al., you are requested to forward the record in the above case to the department returned for the files of your office with departmental letter of August 31, 1904. (I. T. D. 6756.)

Respectfully,

EDWARD M. DAWSON,
Chief Clerk.

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory, August 4, 1906.

The honorable the SECRETARY OF THE INTERIOR.

SIR: This office is in receipt of departmental letter of May 19, 1906 (I. T. D. 6494–1904, 8533, 8723–1905, 2552–1906), enclosing two motions for reconsideration of the Cherokee freedmen consolidated case of David Martin et al. You state that said motions were filed with the department September 7, 1905; that the first (I. T. D. 8533–1905) relates to all of the applicants in the case; that the second (I. T. D. 8723–1905) relates particularly to the case of Josie Looney et al., which was consolidated with the case of David Martin et al., and that although a motion for a rehearing in the Martin case was denied November 18, 1905, it does not appear that action has ever been taken on the enclosed motions. They are transmitted to this office in order that proper record of their filing may be made, to be returned with this office's recommendation.

These motions for review are two of the 311 motions filed with the department September 7, 1905, the filing of which this office was advised January 15, 1906. (I. T. D. 8297, 8337, to 8957, inclusive; odd numbers, 1905, 460–1906.)

All of the applicants included in these motions for review except Fred Martin and Eliza Looney are embraced in the decision of the Commission to the Fiv Civilized Tribes dated March 5, 1904, in the Cherokee freedmen consolidated case of David Martin et al., D 486 et al. (now R 445 et al.), which decision was on August 18, 1904 (I. T. D. 6494–1904), affirmed by the department.

In view of the provisions of the act of Congress approved April 26, 1906 (Public No. 129), relative to the return to the Cherokee Nation of Cherokee freedmen, it is respectfully recommended that the motions, so far as they relate to the applicants in the Martin case, be denied.

The department, on September 13, 1905 (I. T. D. 881–1905), and November 18, 1905 (I. T. D. 14844–1905), denied motions for the reopening of this case.

The records of this office further show that the decision of the Commission to the Five Civilized Tribes dated March 5, 1904, rejecting, among others, the application for the enrollment of Eliza Looney, D 537–R 658, which application was embraced in the Cherokee freedmen consolidated case of Esau Fox et al., D 508 et al., was affirmed by the department on August 31, 1904 (I. T. D. 6756–1904). For the reasons above stated it is also recommended that said motions, so far as they relate to the case of Eliza Looney, be denied.

The decision of the Commission to the Five Civilized Tribes rendered May 13, 1905, rejecting the applicants in the Cherokee freedmen consolidated case of Lewis Martin et al., D. 289 et al., which case included the application of Fred Martin, was on May 13, 1905, forwarded to the department, where it is now pending. No reason appears for the granting of said motions so far as they relate to the case of Fred Martin, and it is respectfully recommended that the same be denied.

Reference is made to two departmental letters of May 2, 1906 (I. T. D. no number; I. T. D. 8347, 8705–1905), relating to the 311 motions for review herein referred to. Proper notations of the filing of these motions have been made upon the records of this office, and the same are returned herewith.

Respectfully,

TAMS BIXBY,
Commissioner.

(Through the Commissioner of Indian Affairs.)

I. T. D. 6756–1904, 13856–1905, 7621–1906.

JULY 7, 1906.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

SIR: There is referred to you for report and recommendation, under the provisions of section 1 of the act of Congress approved April 26, 1906 (Public No. 129), a motion for a reopening and rehearing in the matter of the application for the enrollment of Jake Looney and Frank Looney as Cherokee freedmen, whose cases were consolidated with the case entitled Esau Fox et al. or Flora Murrell et al., wherein the department on August 31, 1904 (I. T. D. 6756), admitted Flora Murrell to enrollment as a Cherokee freedman and denied the application of all the other applicants named therein for enrollment as Cherokee freedmen, and later the department on June 16, 1906 (I. T. D. 2549, 4718–1905), denied a motion for reopening of the consolidated applications of Flora Murrell et al. as Cherokee freedmen filed on behalf of Joseph Ross.

Respectfully,

J. E. W.,
Assistant Secretary.

(Through the Commissioner of Indian Affairs.)

I. T. D. 6756–1904, 2549–1905, 4718–1905.

DEPARTMENT OF THE INTERIOR,
Washington, June 16, 1906.

COMMISSIONER OF INDIAN AFFAIRS.

SIR: Referring to your office letter dated April 29, 1905 (Land 27919), there is inclosed herewith departmental letter to be forwarded to the Commissioner to the Five Civilized Tribes, denying a motion for a reopening of the consolidated applications for enrollment as Cherokee freedmen of Joseph Ross et al., involved in the applications of Flora Murrell et al.

The record with the affidavits filed on motion for reopening are returned for the files of your office.

Respectfully,

JESSE E. WILSON,
Assistant Secretary.

I. T. D. 4766–1904, 2549–1905, 4718–1905.

JUNE 16, 1906.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

SIR: March 16, 1905, there was filed with the department on behalf of Joseph Ross et al., a motion for a reopening of the consolidated applications of Flora Murrell et al., for enrollment as Cherokee freedmen, wherein Joseph Ross was an applicant.

August 31, 1904 (I. T. D. 6756), the department affirmed the decision of the Commission to the Five Civilized Tribes of March 5, 1904, granting the application of Flora Murrell for her enrollment as a Cherokee freedman, and denying the application of all the other applicants named therein for enrollment as Cherokee freedmen.

The department has carefully reviewed the entire original record, with the affidavits filed on motion for reopening in said case, and finds no reason to disturb its decision of August 31, 1904, to which the department still adheres. Said motion for a reopening is hereby denied.

You will so advise moving party, Joseph Ross, at Coffeyville, Kans.

Respectfully,

J. E. W.,
Assistant Secretary.

DEPARTMENT OF THE INTERIOR,
Washington, August 31, 1904.

I. T. D. 6756–1904.

COMMISSIONER OF INDIAN AFFAIRS.

SIR: Referring to your communication of August 23, 1904 (Land 28739), there is inclosed herewith a letter to be forwarded to the Commission to the Five Civilized Tribes, affirming its decision in the matter of the applications of Flora Murrell, et al., for enrollment as Cherokee freedmen.

The record in the case is herewith returned.

Respectfully,

M. W. MILLER,
Assistant Secretary.

I. T. D. 6756–1904. AUGUST 31, 1904.

The COMMISSION TO THE FIVE CIVILIZED TRIBES,
Muskogee, I. T.

GENTLEMEN: March 5, 1904, you rendered your decision in the case involving the applications for enrollment as Cherokee freedmen of Flora Murrell, Esau Fox, Nancy Fox, Ollie Gibson, née Fox, Joe Fox, Arthur Fox, Hattie Fox, Ruthie Fox, Mary Fox, Leever Gibson, Tobe Looney, Eliza Looney, Frank Looney, Joe Ross, Irving G. Looney, John Shadd, Phillis Alexander, Luther J. Alexander, Vessie Alexander, Ezra Alexander, Ermer Alexander, Nelson Murrell, Lewis Ross, Allen Looney, Alice Looney, Bert Looney, Jake Looney, David Ross, Joseph Ross, Harry Ross, Herbert Ross, Vernie Ross, Nelson Ross, Alva Ross, John H. Ross, Steve Looney, Peggy Looney, Chaney Ross, Emma Brown, Steve Willis, Maggie Willis, and Lloyd Willis, holding that Flora Murrell should be enrolled, and that the other applicants should be enrolled.

It was stated that the principal applicants claim for themselves as former slaves of Cherokee citizens, and for their children and grandchildren included in their respective applications, as their descendants; that all of such applicants claiming by descent were born since the commencement of the rebellion, and it is not shown that they have any rights as Cherokee freedmen other than as such descendants.

You found that the evidence shows that Esau Fox, Nancy Fox, Tobe Looney, Joe Ross, Nelson Murrell, Flora Murrell, Lewis Ross, Allen Looney, David Ross, Steve Looney, Peggy Looney, and Chaney Ross were slaves of Cherokee citizens at the commencement of the rebellion; that all of them, except Flora Murrell, removed from the Cherokee Nation during the rebellion and did not return thereto, and, did not take up their residence therein, until after February 11, 1867.

Reporting in the matter August 23, 1904, the Commissioner of Indian Affairs states that the record shows by a "preponderance of credible testimony" that the principal applicants were taken out of the nation during the war and returned and established homes in the Cherokee Nation prior to February 11, 1867; that all applicants of sufficient age are identified on the Wallace and Kern-Clifton rolls and "in isolated cases are found upon the 1880 authenticated Cherokee roll, but it appears from the act of Congress approved June 28, 1898 (30 Stats., 495), section 21, that this roll was not intended for freedmen, but they were specifically excluded from the same." He states that there is some testimony in the record in behalf of the Cherokee Nation, but that it appears to be that of "stock witnesses" who have appeared in many of the Cherokee freedmen cases. He recommends that all of the applicants be enrolled.

The commissioner is in error in stating that some of the applicants are on the 1880 roll. As stated in your decision, none of the applicants is identified on the 1880 authenticated Cherokee roll. In regard to his statement concerning the 1880 roll, attention is called to departmental letter of May 11, 1900, in which you were advised that the roll of 1880 made by the Cherokee Nation is to be accepted by you as conclusive of the rights of all persons claiming as Cherokee freedmen whose names are found thereon and of their descendants.

The department finds nothing to warrant the conclusion that the witnesses for the nation are "stock witnesses."

It is true that, corroborating each other's statements to some extent, most of the principal applicants claim to have come to the Cherokee Nation in the fall of 1866 with Nelson Murrell, one of the applicants. The nation produced a number of witnesses who testified that the two principal applicants, Esau Fox and Nelson Murrell, were residing with their families in southern Kansas, north of the Cherokee Nation, in 1866, 1867, 1868, and 1869, and, some of the witnesses stated, even at a later date; also witnesses to show that in 1868 no freedmen were residing in the Cherokee Nation where most of the principal applicants claim to have been living from September, 1866.

The department finds no reason to disturb your decision, and it is hereby affirmed. You will, however, adjudicate the rights of Nelson Murrell to citizenship as an intermarried citizen.

A copy of the commissioner's letter is inclosed.

Respectfully,

THOS. RYAN, *Acting Secretary.*

Cherokee freedmen D 508 et al.

DEPARTMENT OF THE INTERIOR,
COMMISSION TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory, April 23, 1904.

The honorable the SECRETARY OF THE INTERIOR.

SIR: There is herewith transmitted the record of proceedings had in the consolidated case of Esau Fox et al., including the commission's decision dated March 5, 1904, granting the application for the enrollment of Flora Murrell as a Cherokee freedman, and rejecting the applications for the enrollment of Esau, Nancy, Joe, Arthur, Hattie, Ruthie, and Mary Fox; Ollie and Leever Gibson; Tobe, Eliza, Frank, Irving G., Allen, Alice, Bert, Jake, Steve, and Peggy Looney; Joe, Lewis, David, Joseph, Harry, Herbert, Vernie, Nelson Alva, John H., and Chaney Ross; John Shadd, Phillis, Luther J., Vessie, Ezra, and Ermer Alexander; Nelson Murrell; Emma Brown; and Steve, Maggie, and Lloyd Willis as Cherokee freedmen.

Respectfully,

TAMS BIXBY, *Chairman.*

(Through the Commissioner of Indian Affairs.)

DEPARTMENT OF THE INTERIOR, COMMISSION TO THE FIVE CIVILIZED TRIBES.

In the matter of the application of Esau Fox et al., for enrollment as Cherokee freedmen, consolidating the applications of

Esau Fox et al	Cherokee freedmen D 508.
Tobe Looney	Cherokee freedman D 512.
Eliza Looney	Cherokee freedman D 537.
Frank Looney	Cherokee freedman D 538.
Joe Ross et al	Cherokee freedmen D 542.
Phillis Alexander et al	Cherokee freedmen D 544.
Nelson Murrell et al	Cherokee freedmen D 548.
Lewis Ross	Cherokee freedman D 549.

Allen Looney et al	Cherokee freedmen D 551.
Jake Looney et al	Cherokee freedmen D 573.
David Ross et al	Cherokee freedmen D 799.
Steve Looney et al	Cherokee freedmen D 519.
Chaney Ross	Cherokee freedman D 547.
Emma Brown et al	Cherokee freedmen D 847.
Maggie Willis et al	Cherokee freedmen D 936.

DECISION.

The record herein shows that applications for enrollment as Cherokee freedmen were made to this commission as follows, by Esau Fox for himself, his wife, Nancy, and his minor children, Ollie Fox (now Ollie Gibson), Joe Fox, Arthur Fox, Hattie Fox, Ruthie Fox, and Mary Fox. A marriage license and certificate having been filed with the commission subsequent to said application showing the marriage of said Ollie Fox to one Posey Gibson she will now be listed for enrollment as Ollie Gibson. Subsequent to said application, an affidavit was filed showing the birth of Leever Gibson, minor child of Ollie Gibson, and the same is made a part of the record herein. By Emily Looney for her husband, Tobe Looney, as a Cherokee freedman, and for herself as a Cherokee freedman by intermarriage. By Eliza Looney for herself and her husband, Frank Looney. By Joe Ross for himself and his two grandsons, Irving G. Looney and John Shadd. By Phillis Alexander for herself and her four minor children, Luther J., Vessie, Ezra, and Ermer Alexander. By Nelson Murrell for himself and his wife, Flora Murrell. By Lewis Ross for himself. By Allen Looney for himself and his two minor children, Alice and Bert Looney. By Jake Looney for himself as a Cherokee freedman, and for his wife, Freddie Looney, as a Cherokee freedman, by intermarriage. By David Ross for himself and his minor children, Joseph, Harry, Herbert, Vernie, Nelson, Alva, and John H. Ross as Cherokee freedmen, and for his wife, Mary Ross, as a Cherokee freedman by intermarriage. By Steve Looney for himself and his wife, Peggy Looney. By Chaney Ross for herself. By Emma Brown for herself and her minor son, Steve Willis. By Maggie Willis for herself and her minor son, Lloyd Willis. The status of persons applying for enrollment as Cherokee freedmen by intermarriage not being fixed at this time, the applications for the enrollment of Emily Looney, Freddie Looney, and Mary Ross, as such will not be considered, or passed upon in this decision. Copies of the testimony taken at various times in the matter of the applications of Daniel Thompson et al., Rufus Ross, Elizabeth Meigs, Samuel Beck, and Emma McAwee et al. have been filed herewith, and are made a part of the record herein.

The evidence shows that Esau Fox, Nancy Fox, Tobe Looney, Joe Ross, Nelson Murrell, Flora Murrell, Lewis Ross, Allen Looney, David Ross, Steve Looney, Peggy Looney, and Chaney Ross, claim for themselves, as former slaves of Cherokee citizens, the right to enrollment, and for the above-named children and grandchildren included in their respective applications, as their descendants; that Eliza Looney is a descendant of said Esau and Nancy Fox; that Frank Looney and Jake Looney are the descendants of said Tobe Looney; that Phillis Alexander and her minor children are the descendants of said Joe Ross; that Emma Brown and Maggie Willis, together with their children, are the descendants of said Chaney Ross. All of said applicants, claiming by descent, were

born since the commencement of the rebellion, and it is not shown that they have any rights as Cherokee freedmen, other than as such descendants.

The evidence further shows that Esau Fox, Nancy Fox, Tobe Looney, Joe Ross, Nelson Murrell, Flora Murrell, Lewis Ross, Allen Looney, David Ross, Steve Looney, Peggy Looney, and Chaney Ross were slaves of Cherokee citizens at the commencement of the rebellion; that all of them, except Flora Murrell, removed from the Cherokee Nation during the rebellion, and did not return thereto and take up their residence therein, until after February 11, 1867. None of the applicants herein are identified on the 1880 authenticated Cherokee roll.

The evidence further shows that Flora Murrell was residing in the Cherokee Nation at the date of the making of the Cherokee treaty of 1866, and has continued to reside therein from that time, up to and including the date of her application herein.

It is, therefore, the opinion of this commission that Flora Murrell should be enrolled as a Cherokee Freedman in accordance with the provisions of section twenty-one of the act of Congress approved June 28, 1898 (30 Stats., 495); and that the applications for the enrollment of Esau Fox, Nancy Fox, Ollie Gibson, nee Fox, Jos Fox, Arthur Fox, Hattie Fox, Ruthie Fox, Mary Fox, Leever Gibson, Tobe Looney, Eliza Looney, Frank Looney, Joe Ross, Irving G. Looney, John Shadd, Phillis Alexander, Luther J. Alexander, Vessie Alexander, Ezra Alexander, Ermer Alexander, Nelson Murrell, Lewis Ross, Allen Looney, Alice Looney, Bert Looney, Jake Looney, David Ross, Joseph Ross, Harry Ross, Herbert Ross, Vernie Ross, Nelson Ross, Alva Ross, John H. Ross, Steve Looney, Peggy Looney, Chaney Ross, Emma Brown, Steve Willis, Maggie Willis, and Lloyd Willis as Cherokee freedmen, should be denied, under the provisions of section twenty-one of said act of Congress, and it is so ordered.

COMMISSION TO THE FIVE CIVILIZED TRIBES,
TAMS BIXBY, *Chairman.*
T. B. NEEDLES, *Commissioner.*
C. R. BRECKENRIDGE, *Commissioner.*
W. E. STANLEY, *Commissioner.*

Dated at Muskogee, Indian Territory, this Mar. 5, 1904.

I. T. D. 6295–1904, 7660–1904.

DEPARTMENT OF THE INTERIOR,
Washington, October 8, 1904.

COMMISSIONER OF INDIAN AFFAIRS.

SIR: There is inclosed herewith departmental letter to be forwarded to the Commission to the Five Civilized Tribes, advising it of the denial of a motion for rehearing, filed by the applicants, in the Cherokee freedman case of George and July Bell.

The papers relating to the case are returned for the files of your office.

Respectfully,

(Signed) M. W. MILLER,
Assistant Secretary.

OCTOBER 8, 1904.

COMMISSION TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

GENTLEMEN: The department is in receipt of a communication from W. J. Sullivan, Muskogee, I. T., dated July 26, 1904, transmitting a motion for rehearing in the Cherokee freedman case of George and July Bell, in which case the department, on June 21, 1904, approved your decision rejecting the applicants. Said motion for rehearing is based upon the decision of the department in the Cherokee freedman case of Charles Foreman.

The Assistant Attorney General, in his opinion of April 16, 1904, relative to the case of Charles Foreman, stated that—

"While Foreman was one of Ross' retinue upon a diplomatic mission from the Cherokee Nation to the Government of the United States, he and all others of Ross' party equally with the delegate were in view of the law residents of the State from which the delegate was credited. It follows that from the date of the treaty to the severing of his employment by the delegate Foreman was, in view of the law and a proper construction of the treaty, a resident of the Territory. It is immaterial whether his going with the delegate was constrained, the obedience of a slave, or the voluntary act of a free person."

In the case in which Mr. Sullivan desires a rehearing the record shows that the applicant George Bell was the slave of L. B. Bell, apparently a private citizen of the Cherokee Nation at the commencement of the rebellion; that July Bell belonged to one J. T. Cunningham, also apparently a private citizen of the Cherokee Nation; that they were taken out of the Cherokee Nation by L. B. Bell in 1861, and did not return thereto until May, 1867.

The motion is therefore denied, and you will so notify Mr. Sullivan.

Respectfully,

THOS. RYAN, *Acting Secretary.*

I. T. D. 4286–1904, 6295–1904.

DEPARTMENT OF THE INTERIOR,
Washington, September 2, 1904.

COMMISSIONER OF INDIAN AFFAIRS.

SIR: With departmental letter of June 21, 1904, there were returned to your office for your files the papers in the Cherokee freedmen case of George Bell et al.

A motion having been filed with the department to reopen the said case, you are requested to transmit said papers to the department for consideration in connection with the motion referred to.

Respectfully,

(Signed) THOS. RYAN, *Acting Secretary.*

I. T. D. 4286–1904. DEPARTMENT OF THE INTERIOR,
Washington, June 21, 1904.

COMMISSIONER OF INDIAN AFFAIRS.

SIR: Referring to the acting commissioner's communication of May 24, 1904 (Land, 19282–1904), there is inclosed herewith departmental letter, to be forwarded to the Commission to the Five Civilized Tribes, affirming its decision rejecting the application for the enrollment of George and July Bell as Cherokee freedmen.

The papers in the case are inclosed herewith.

Respectfully,

(Signed) E. A. HITCHCOCK, *Secretary.*

I. T. D. 4286–1904.

JUNE 21, 1904.

COMMISSION TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

GENTLEMEN: March 16, 1904, you transmitted the record in the matter of the application for the enrollment of George and July Bell as Cherokee freedmen, including your decision of March 5, 1904, rejecting said application.

Reporting in the matter May 24, 1904, the Acting Commissioner of Indian Affairs recommends that your decision be approved. A copy of his letter is inclosed.

The department concurs in said recommendation, and your decision is hereby affirmed.

Respectfully,

E. A. HITCHCOCK, *Secretary.*

Cherokee F. D–706, D–1021.

DEPARTMENT OF THE INTERIOR,
COMMISSION TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory, March 16, 1904.

The honorable the SECRETARY OF THE INTERIOR.

SIR: There is herewith transmitted the record of proceedings had in the matter of the applications for the enrollment of George and July Bell as Cherokee freedmen, together with the commission's decision, dated March 5, 1904, rejecting said applications.

Respectfully,

(Signed) C. R. BRECKINBRIDGE,
Commissioner in Charge.

(Through the Commissioner of Indian Affairs.)

DEPARTMENT OF THE INTERIOR, COMMISSION TO THE FIVE CIVILIZED TRIBES.

In the matter of the application of George Bell et al. for enrollment as Cherokee freedmen, consolidating the applications of—

George Bell ..... Cherokee freedmen D– 706
July Bell ..... Cherokee freedmen D–1021

DECISION.

The record herein shows that applications for enrollment as Cherokee freedmen were made to this commission by George Bell and July Bell, each for himself. The evidence herein shows that the applicants, George Bell and July Bell, were the slaves of one L. B. Bell, a Cherokee citizen at the commencement of the rebellion; that they were taken out of the Cherokee Nation during the rebellion and did not return thereto until May, 1867. Neither of the applicants' names are found on the 1880 authenticated roll of the Cherokee Nation.

It is therefore the opinion of this commission that the applications for the enrollment of George Bell and July Bell as Cherokee freedmen should be denied under the provisions of section twenty-one of the act of Congress, approved June 28, 1898 (30 Stats., 495), and it is so ordered.

COMMISSION TO THE FIVE CIVILIZED TRIBES.
TAMS BIXBY, *Chairman.*
THOMAS B. NEEDLES, *Commissioner.*
C. R. BRECKINBRIDGE, *Commissioner.*
W. E. STANLEY, *Commissioner.*

MUSKOGEE, I. T., this Mar. 5, 1904.

I. T. D. 594–1907.

JANUARY 21, 1907.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

SIR: On January 9, 1907 (Land 40528–1906, 72–1907), the Indian Office transmitted your report dated December 24, 1906, in the matter of a motion for rehearing in the application of Adaline Hardman et al., for enrollment as Cherokee freedmen.

The applicant, Adaline Hardman, is a party to the consolidated case of Katie Blackwell et al., in which you rendered an adverse decision April 20, 1904, and which said decision was affirmed by the department on October 31, 1904.

On April 9, 1906, however, departmental decision of October 31, 1904, was rescinded as to Mattie McNair and James Landrum.

On May 7, 1906, the department denied a motion for review in the cases of Katie Blackwell, Gertie Tinnon, Lunnie Tinnon, and Thomas Ross.

The Cherokee Nation protests against the granting of the motion on behalf of Adaline Hardman.

You state that except by the affidavit of the applicant, the motion is unsupported by affidavits, being merely the statements of what the attorneys expect to prove. You recommend that said motion be denied.

The Indian Office concurs in your recommendation. A copy of its letter is inclosed.

In view of the fact that the department this day has denied the application of Andy Rider, the alleged father of this applicant, and for the reasons set forth in your recommendation, the motion is hereby denied.

The papers are returned for the files of the Indian Office.

Respectfully,

THOS. RYAN,
First Assistant Secretary.

(Through the Commissioner of Indian Affairs.)

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory, December 24, 1906.

The honorable the SECRETARY OF THE INTERIOR.

SIR: There is enclosed a motion filed June 14, 1906, by Starr and Patten, Vinita, Indian Territory, attorneys for applicant, for a rehearing of the Cherokee freedman case of Adaline Hardman. The protest of the attorney for the Cherokee Nation against this motion, filed July 5, 1906, is also enclosed.

The decision of the Commission to the Five Civilized Tribes, dated April 20, 1904, rejecting, among others, the application for the enrollment of Adaline Hardman, No. D. 634 (embraced in the consolidated case of Katie Blackwell et al. D. 327 et al.), was affirmed by the department October 31, 1904. (I. T. D. 8138–1904.)

Except by the affidavit of the applicant, the motion is unsupported by affidavits, merely the statements being made as to what the attorneys expect to prove, and they do not state by what witnesses they expect to maintain their contentions.

In accordance with the ruling of the department of January 19, 1905 (I. T. D. 7744, 7514–1904), in the Cherokee freedman case of Celia Kirkpatrick et al., it is respectfully recommended that the motion be denied.

Respectfully,

(Signed) TAMS BIXBY,
Commissioner.

(Through the Commissioner of Indian Affairs.)

I. T. D. 4720–1905, 8835–1905, 4998–1906.

DEPARTMENT OF THE INTERIOR,
Washington, May 7, 1906.

The COMMISSIONER OF INDIAN AFFAIRS.

SIR: There is enclosed departmental letter to be forwarded to the Commissioner to the Five Civilized Tribes, advising him of the denial of a motion for review in the Cherokee freedman case of Katie Blackwell, Gertie Tinnon, Lunnie Tinnon, and Thomas Ross.

The papers received with your office letter of April 29, 1905 (Land 24018–05), are enclosed, together with the motion mentioned and also a letter from the Commissioner to the Five Civilized Tribes of March 24, 1906, returning the record in the case. Reference is made to departmental letter of March 14, 1906, to the commissioner relative to Mattie McNair and James Landrum.

You are requested to advise the local attorneys who filed the motion of the action taken.

Respectfully,

(Signed) JESSE E. WILSON,
Assistant Secretary.

I. T. D. 4720–1905, 8835–1905, 4998–1906. MAY 7, 1906.

The COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

SIR: A motion for review, filed September 7, 1905, in the Cherokee freedman case of Katie Blackwell, Gertie Tinnon, Lunnie Tinnon, and Thomas Ross, of the filing of which you were advised January 15, 1906, is hereby denied, for the same reason given in departmental letter of May 2, 1906, dismissing similar motions in a large number of Cherokee freedman cases.

The Indian Office has been requested to advise the local attorney for the applicants hereof.

Respectfully, JESSE E. WILSON, *Assistant Secretary.*

I. T. D. 5688–1906. DEPARTMENT OF THE INTERIOR,
Washington, April 9, 1906.

COMMISSIONER OF INDIAN AFFAIRS.

SIR: Referring to your office letter dated April 3, 1906 (Land 21515), forwarding for action thereon a letter from the Commissioner to the Five Civilized Tribes dated March 3, 1906, requesting the rescission of the decision of the department of October 31, 1904, in the Cherokee freedman case of Katie Blackwell et al., so far as it affects Mattie McNair and her son, James Landrum, applicants therein.

Your attention is invited to departmental letter of March 14, 1906, in which said rescission requested in the commissioner's letter of March 3, 1906, was made, and the record was returned, through your office, to the commissioner, with instructions to readjudicate the case as to Mattie McNair and James Landrum.

The letter of the commissioner of March 3, 1906, together with a copy of the evidence submitted September 28, 1905, in the matter of the application for the enrollment of Martha Hailstock, believed to be identical with the said Mattie McNair, is returned to your office, to be forwarded to the commissioner for appropriate disposition in connection with departmental letter of March 14, 1906, returning the record in said case for a readjudication.

Respectfully,

(Signed) THOS. RYAN,
First Assistant Secretary.

I. T. D. 8138–1904, 4720–1905, 8669–1905.

MARCH 14, 1906.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

SIR: March 25, 1905, the Commission to the Five Civilized Tribes recommended that the decision of the department, in letter to the commission of October 31, 1904, approving its decision in the Cherokee freedmen case of Katie Blackwell et al., adverse to the applicants except Henry Chambers, be rescinded so far as it relates to Mattie

McNair and her son, James Landrum, as it is believed Mattie McNair can be identified upon the 1880 authenticated Cherokee roll.

The said decision of the department is hereby rescinded as to Mattie McNair and James Landrum, and you are authorized to readjudicate the case. The record is returned as requested.

As, however, motions for review as to other claimants in this consolidated case are pending, it is requested that the record be returned, direct, to the department with as little delay as possible.

Respectfully,

THOS. RYAN, *First Assistant Secretary.*

(Through the Commissioner of Indian Affairs.)

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory, March 3, 1906.

The honorable the SECRETARY OF THE INTERIOR.

SIR: On October 31, 1904 (I. T. D. 8138–1904), the department affirmed the decision of the Commission to the Five Civilized Tribes, dated April 20, 1904, in the Cherokee freedman consolidated cases of Katie Blackwell et al. (F. D. 327 et al.). Among others embraced in said decision was the application of Mattie McNair for the enrollment of herself and minor child, James Landrum, as Cherokee freedmen. On June 30, 1902, application was made for the enrollment of one Martha Hailstack as a citizen by blood of the Cherokee Nation, her name being identified on the 1880 authenticated roll of citizens of the Cherokee Nation, and from testimony taken in connection with said application on September 28, 1905, it is apparent that the Martha Hailstack identified on the 1880 Cherokee roll is identical with the applicant, Mattie McNair.

It is respectfully recommended that the decision of the department of October 31, 1904, in the Cherokee freedman case of Katie Blackwell et al. be rescinded so far as it relates to the applicant, Mattie McNair, and her child, James Landrum, in order that their right to enrollment may be readjudicated in connection with the evidence offered on September 28, 1905, a copy of which is enclosed herewith, in the matter of the application for the enrollment of Martha Hailstack.

Respectfully,

(Signed) TAMS BIXBY, *Commissioner.*

(Through the Commissioner of Indian Affairs.)

I. T. D. 8138–1904.
L. R. S.

DEPARTMENT OF THE INTERIOR,
Washington, October 31, 1904.

COMMISSIONER OF INDIAN AFFAIRS.

SIR: Referring to the acting commissioner's letter of September 26, 1904 (Land 33875–1904), there is inclosed departmental letter to be forwarded to the Commission to the Five Civilized Tribes, affirming its decision in the Cherokee freedman case of Katie Blackwell et

al., which decision was favorable to Henry Chambers and adverse to all the other applicants.

The papers in the case are returned herewith.

Respectfully,

M. W. MILLER, *Assistant Secretary.*

I. T. D. 8138–1904.

OCTOBER 31, 1904.

COMMISSION TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

GENTLEMEN: May 17, 1904, you transmitted the record in the consolidated Cherokee freedman case of Katie Blackwell et al. (F. D–327, et al.), including your decision of April 20, 1904, granting the application for the enrollment of Henry Chambers, and rejecting the applications for the enrollment of all the other applicants.

Reporting in the matter September 26, 1904, the Acting Commissioner of Indian Affairs recommends that your decision be approved. A copy of his letter is inclosed.

The department concurs in said recommendation, and your decision is hereby affirmed.

Respectfully,

E. A. HITCHCOCK, *Secretary.*

Cherokee freedmen, D. 327, et al.

DEPARTMENT OF THE INTERIOR,
COMMISSION TO THE FIVE CIVILIZED TRIBES,
MUSKOGEE, INDIAN TERRITORY, *May 17, 1904.*

The honorable the SECRETARY OF THE INTERIOR.

SIR: There is herewith transmitted the record of proceedings had in the consolidated case of Katie Blackwell et al., including the commission's decision dated April 20, 1904, granting the application for the enrollment of Henry Chambers as a Cherokee freedman and rejecting the applications for the enrollment of Katie, Lucinda, Pearlee, and Margery L. Blackwell, Gertie, Lunnie, and Luie Tinnon, Thomas Ross, Ann Williams, Vinita, and Corrail Martin, Mattie Madden, Mary Riley, Rosa and Mattie McNair, James Landrum, Adaline Hardman, Jesse Roach, Daniel Thompson, and Morris A. Sorrell as Cherokee freedmen.

Respectfully,

TAMS BIXBY, *Chairman.*

(Through the Commissioner of Indian Affairs.)

DEPARTMENT OF THE INTERIOR.

COMMISSION TO THE FIVE CIVILIZED TRIBES.

In the matter of the application of Katie Blackwell et al. for enrollment as Cherokee freedmen, consolidating the applications of:

Katie Blackwell et al	Cherokee freedmen D 327
Lucinda Blackwell et al	Cherokee freedmen D 333
Ann Williams	Cherokee freedmen D 334

Vinita Martin et al	Cherokee freedmen D 343
Mattie Madden	Cherokee freedmen D 438
Mary Riley et al	Cherokee freedmen D 624
Mattie McNair et al	Cherokee freedmen D 629
Adaline Hardman	Cherokee freedmen D 634
Jesse Roach	Cherokee freedmen D 754
Daniel Thompson	Cherokee freedmen D 756
Morris A. Sorrell et al	Cherokee freedmen D 193
Henry Chambers	Cherokee freedmen D 757

DECISION.

The record herein shows that applications for enrollment, as Cherokee freedmen, were made to this commission by Katie Blackwell for herself, her minor child, Thomas Ross, and her sister's children, Gertie and Lunnie Tinnon; by Lucinda Blackwell for herself and minor child, Pearlee Blackwell; and, subsequent to the date of this application, an affidavit was filed as to the birth of her minor child, Margery L. Blackwell, and the same is made a part of the record herein; by Ann Williams for herself; by Vinita Martin for herself and minor child, Corrail Martin; by John Madden for his wife, Mattie Madden, among others; the other parties to his application, being differently classified, are not embraced in this decision; by Mary Riley for herself and granddaughter, Rosa McNair; by Mattie McNair for herself and minor child, James Landrum; by Adaline Hardman for herself; by Jesse Roach for himself; by Daniel Thompson for himself; by Morris A. Sorrell for himself and his half brother, Luie Tinnon; and by Henry Chambers for himself.

The evidence shows that the applicants Katie Blackwell and Mary Riley are, and that Nannie Vann (formerly Morgan) and Dicey Tinnon (or Sorrell) were, the daughters of Martha Thompson. It is alleged that Martha Thompson and her said daughters were slaves in the Cherokee Nation at the commencement of the rebellion. The evidence further shows that they were taken out of said nation during the rebellion and that neither of them returned thereto within the time specified in the decree of the Court of Claims rendered on February 3, 1896, in the case of Moses Whitmire, trustee, etc., versus the Cherokee Nation et al., for the return of freedmen to said nation.

The said Thomas Ross, Lucinda Blackwell, Pearlee Blackwell, Margery L. Blackwell, Ann Williams, and Daniel Thompson are the descendents of said Katie Blackwell, born since 1866, and have no rights as Cherokee freedmen except such as they may have acquired through her. The said Jesse Roach, also a son of Katie Blackwell, was born in slavery and resided with his mother in the Cherokee Nation at the commencement of the rebellion. It is presumed that he was taken out of said nation with his mother during the rebellion, being at that time a minor, and there is no evidence showing that he returned to said nation within the time specified in the decree of the Court of Claims, supra.

The said Gertie Tinnon, Lunnie Tinnon, Vinita Martin, Corrail Martin, Mattie Madden, and Morris A. Sorrell are the descendants of Dicey Tinnon (or Sorrell), born since 1866, and have no rights as Cherokee freedmen except such as they may have acquired through her. Luie Tinnon is a son of Dicey Tinnon by Horace Tinnon; and it does not appear that Horace Tinnon was the slave of a Cherokee

citizen or a free colored person residing in the Cherokee Nation at the commencement of the rebellion.

The said Mattie McNair and James Landrum are the descendants of Nannie Vann (formerly Morgan), born since 1866, and have no rights as Cherokee freedmen except such as they may have acquired through her. Rosa McNair and Adaline Hardman are descendants of Mary Riley, having been born since 1866, and have no rights as Cherokee freedmen except such as they may have acquired through said Mary Riley. Neither the name of Horace Tinnon nor the names of any of said applicants herein are found on the 1880 authenticated roll of the Cherokee Nation.

The evidence further shows that the applicant, Henry Chambers, is the son of said Katie Blackwell, by one Charlie Chambers, who is identified on the 1880 authenticated roll of the Cherokee Nation. It is presumed from this enrollment that the Cherokee Nation recognized that the said Charlie Chambers complied with the terms of the treaty of 1866. Henry Chambers has been a resident of the Indian Territory all his life, and has resided in the Cherokee Nation continuously from about 1874 up to and including the date of his application herein.

It is, therefore, the opinion of this commission that Henry Chambers, having been born since 1866, should be enrolled as a Cherokee freedman, in accordance with the provisions of section twenty-one of the act of Congress approved June 28, 1898 (30 Stats., 495); and it is further the opinion of this commission that the applications for the enrollment of Katie Blackwell, Thomas Ross, Gertie Tinnon, Lunnie Tinnon, Lucinda Blackwell, Pearlee Blackwell, Margery L. Blackwell, Ann Williams, Vinita Martin, Corrail Martin, Mattie Madden, Mary Riley, Rosa McNair, Adaline Hardman, Mattie McNair, James Landrum, Jesse Roach, Daniel Thompson, Morris A. Sorrell, and Luie Tinnon, as Cherokee Freedmen, should be denied under the provisions of said section twenty-one, and it is so ordered.

COMMISSION TO THE FIVE CIVILIZED TRIBES.
TAMS BIXBY, *Chairman.*
T. B. NEEDLES, *Commissioner.*
C. R. BRECKENBRIDGE, *Commissioner.*
———— ————, *Commissioner.*

MUSKOGEE, INDIAN TERRITORY, *this April 20, 1904.*

I. T. D. 2378–1905, 6580–1907.

DEPARTMENT OF THE INTERIOR,
Washington, March 4, 1907.

Direct.
COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

SIR: In view of the limited time allowed by the act of April 26, 1906 (34 Stat., 137), for completing the citizenship rolls of the Five Civilized Tribes in Indian Territory, the motion for a reopening, rehearing, and review of the Cherokee freedman case of William H. Buffington et al., transmitted with your letter of December 19, 1906, and Indian Office letter of February 28, 1907, is hereby denied.

A copy of Indian Office letter is inclosed.

The papers in the case and a carbon copy hereof have been sent to the Indian Office.

Respectfully, E. A. HITCHCOCK, *Secretary.*

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory, December 19, 1906.

The honorable the SECRETARY OF THE INTERIOR.

SIR: There is transmitted herewith a motion by claimants, filed June 25, 1906, "for reopening, rehearing, and review of their cases, and transmittal of the record to the honorable Attorney General of the United States for his review and opinion," of the Cherokee freemen consolidated case of William (H) Buffington et al., D555 et al. This motion, which is unsigned, was submitted by Ambrose S. McRea, and it lacks evidence of a copy thereof having been served on the attorney for the Cherokee Nation.

April 26, 1904 (I. T. D. 2282–1904), the department affirmed the decision of the Commission to the Five Civilized Tribes dated July 10, 1903, rejecting the applications for the enrollment of the applicants embraced in the consolidated case of William H. Buffington et al.

The motion is without merit and it is respectfully recommended that it be denied. There is no question of law or fact contained in the motion which has not heretofore been considered in connection with the case.

October 12, 1904 (I. T. D. 8537–1904), the department denied a motion for a rehearing in this case.

Respectfully,

TAMS BIXBY, *Commissioner.*

(Through the Commissioner of Indian Affairs.)

I. T. D. 2282–1904, 8537–1904.

DEPARTMENT OF THE INTERIOR,
Washington, October 12, 1904.

COMMISSIONER OF INDIAN AFFAIRS.

SIR: There is inclosed herewith departmental letter to be forwarded to the Commission to the Five Civilized Tribes, denying a motion for the reopening of the Cherokee freedman enrollment case of William H. Buffington et al.

Said motion is inclosed herewith for the files of your office.

Respectfully,

M. W. MILLER,
Assistant Secretary.

I. T. D. 2282–1904, 8537–1904.

DEPARTMENT OF THE INTERIOR,
Washington, October 12, 1904.

COMMISSION TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

GENTLEMEN: There was received by the department October 7, 1904, a petition by Anne Allen for the reopening of the Cherokee

freedman enrollment case of William H. Buffington et al., the subject of departmental letter of April 26, 1904.

The motion is hereby denied, as it bears no evidence of service upon the attorney for the Cherokee Nation and as it presents no new questions for consideration.

Motions for review are not granted on the allegation that a reexamination of the evidence may bring about a different conclusion from that originally reached.

You will advise the applicant, whose address is given as Lenapah, hereof.

Respectfully,

THOS. RYAN, *Acting Secretary.*

I. T. D. 2282–1904.

DEPARTMENT OF THE INTERIOR,
Washington, April 26, 1904.

COMMISSIONER OF INDIAN AFFAIRS.

SIR: Referring to the acting commissioner's communication of March 15, 1904 (Land 76141–1903), there is inclosed herewith departmental letter to be forwarded to the Commission to the Five Civilized Tribes, affirming its decision rejecting the applications of William H. Buffington et al. for enrollment as Cherokee freedmen.

The papers relating to the case are returned herewith, and it will be observed that William Henry White, Columbian Building, in this city, entered his appearance in this case on November 14, 1903.

Respectfully,

THOS. RYAN, *Acting Secretary.*

I. T. D. 2282–1904.

APRIL 26, 1904.

COMMISSION TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

GENTLEMEN: July 23, 1903, you transmitted the record in the matter of the applications for enrollment as Cherokee freedmen of William H. Buffington et al. (Cherokee freedmen D–555, 556, 557, 558, 559, 784, 785, 839), including your decision of July 10, 1903, rejecting the applications for the enrollment of William H., Roy, Lewis, Rector, Solomon, and Mariah Buffington, Anna Flossie, Gracie, Wilina, and James R. I. Allen, William H. Buffington, jr., John Buffington, Georgeanna, Sellia, Lula M., and Charlie Reeves, Rosa and Bessie Buffington, Viola Marrill and Reuben Buffington.

Reporting in the matter March 15, 1904, the Acting Commissioner of Indian Affairs recommends that your decision be approved. A copy of his letter is inclosed.

The department concurs in said recommendation and your decision is approved.

Respectfully,

THOS. RYAN, *Acting Secretary.*

I. T. D. 9733–1903.

DEPARTMENT OF THE INTERIOR,
Washington, November 23, 1903.

The COMMISSIONER OF INDIAN AFFAIRS.

SIR: November 14, 1903, there was received from Mr. William Henry White, Columbian Building, this city, a communication requesting his appearance entered in Cherokee freedmen case of William H. Buffington.

As the case referred to does not appear to have been received by the department, said communication with authorization signed by applicant and transmitted by Mr. White, are inclosed for consideration in connection with the case, as it is presumed the same is in your office.

Respectfully, THOS. RYAN, *Acting Secretary.*

Cherokee freedmen D–555, 556, 557–558, 559, 784, 785, 839.

DEPARTMENT OF THE INTERIOR,
COMMISSION TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory, July 23, 1903.

The honorable the SECRETARY OF THE INTERIOR.

SIR: There is herewith transmitted the record of proceedings had in the matter of the applications for the enrollment of William H. Buffington et al., together with the commission's decisions, dated July 10, 1903, rejecting the applications for the enrollment of William H., Roy, Lewis, Recotr, Solomon, and Mariah Buffington; Anna, Flossie, Gracie, Wilina, and James R. I. Allen, William H. Buffington, jr., John Buffington, Georgeanna, Sellie, Lula M., and Charlie Reeves, Rosa and Bessie Buffington, Viola Marrill and Reuben Buffington, as Cherokee freedmen.

Respectfully,

T. B. NEEDLES,
Commissioner in Charge.

(Through the Commissioner of Indian Affairs.)

DEPARTMENT OF THE INTERIOR, COMMISSION TO THE FIVE CIVILIZED TRIBES.

In the matter of the application of William H. Buffington et al., for enrollment as Cherokee freedmen, consolidating the applications of

William H. Buffington et al	Cherokee freedmen D 555
Anna Allen et al	Cherokee freedmen D 556
William H. Buffington, jr	Cherokee freedmen D 557
John Buffington	Cherokee freedmen D 558
Georgeanna Reeves et al	Cherokee freedmen D 559
Rosa Buffington	Cherokee freedmen D 784
Bessie Buffington et al	Cherokee freedmen D 785
Reuben Buffington	Cherokee freedmen D 839

DECISION.

The record herein shows that applications for enrollment, as Cherokee freedmen, were made to this commission by William H. Buffington, for himself and minor children, Roy, Lewis, Recotr, and Solomon Buffington, and for his mother, Mariah Buffington; by Anna Allen, for herself and minor children, Flossie, Gracie, Wilina, and James R. I. Allen; by William H. Buffington, jr., for himself; by John Buffington, for himself; by Georgeanna Reeves, for herself and minor children, Sellie, Lula M., and Charlie Reeves; by Rosa

Buffington, for herself; by Bessie Buffington, for herself and minor child, Viola Marrill; and by Reuben Buffington, for himself.

The evidence shows that the applicants, Mariah Buffington, William H. Buffington, and Georgeanna Reeves, claim right to enrollment as former slaves of Cherokee citizens; but it does not appear from said evidence that the said Mariah Buffington, William H. Buffington, and Georgeanna Reeves, or any of them, were slaves of Cherokee citizens or free colored persons residing in the Cherokee Nation at the commencement of the rebellion, or that they were residing in the Cherokee Nation on July 19, 1866, or at any time within six months thereafter.

The evidence further shows that all the other applicants herein have been born since 1866 and are descendants of and claim right to enrollment through the said Mariah Buffington, William H. Buffington, or Georgeanna Reeves.

None of the names of the applicants herein are found on the 1880 authenticated roll of the Cherokee Nation.

It is, therefore, the opinion of this commission that the applications for the enrollment of William H. Buffington, Roy Buffington, Lewis Buffington, Rector Buffington, Solomon Buffington, Mariah Buffington, Anna Allen, Flossie Allen, Gracie Allen, Wilina Allen, James R. I. Allen, William H. Buffington, jr., John Buffington, Georgeanna Reeves, Sellie Reeves, Lula M. Reeves, Charlie Reeves, Rosa Buffington, Bessie Buffington, Viola Marrill, and Reuben Buffington, as Cherokee freedmen, should be denied under the provisions of section twenty-one of the act of Congress approved June 28, 1898 (30 Stats., 495), and it is so ordered.

COMMISSION TO THE FIVE CIVILIZED TRIBES.
TAMS BIXBY, *Chairman.*
T. B. NEEDLES, *Commissioner.*
C. R. BRECKENRIDGE, *Commissioner.*
W. E. STANLEY, *Commissioner.*

MUSKOGEE, INDIAN TERRITORY, this Jul. 10, 1903.

(Copy.)

DEPARTMENT OF THE INTERIOR,
Washington, July 6, 1906.

I. T. D. 8060–1905.

COMMISSIONER OF INDIAN AFFAIRS.

SIR: Referring to your office letter of July 3, 1905 (Land 47228), there is inclosed departmental letter to be forwarded to the Commissioner to the Five Civilized Tribes, affirming the decision of the Commission to the Five Civilized Tribes dated June 16, 1905, rejecting the applications for the enrollment of John Freeman et al., as Cherokee freedmen, also denying a motion for review of said decision.

The papers in the matter, together with said motion, are inclosed for the files of your office.

Respectfully,

(Signed) JESSE E. WILSON,
Assistant Secretary.

I. T. D. 8050–1905.

LLB

JULY 6, 1906.

COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

SIR: On June 16, 1906, the Commission to the Five Civilized Tribes transmitted the record, together with its decision dated June 16, 1905, in the matter of the applications for the enrollment of John Freeman et al., as Cherokee freedmen.

On July 1, 1903, the Commission to the Five Civilized Tribes rendered a decision in this case in favor of most of the applicants.

On July 2, 1903, the attorneys for the Cherokee Nation requested a rehearing, alleging newly discovered evidence. This motion was denied by the commission on July 27, 1903, for the reason that the nation had not exercised reasonable diligence in the filing of said motion. The attorneys for the nation appealed to the department from the action of the commission on September 17, 1903.

On April 4, 1904, the department decided that the motion of the attorneys for the nation was reasonable and proper, and it accordingly remanded the case.

Reporting July 3, 1905, the Indian Office concurs in the decision of the commission dated June 16, 1905. A copy of its letter is inclosed.

On September 7, 1905, the attorneys for the applicants filed a motion for review of the commission's decision in this case. Said motion has been duly considered in connection with the case.

The department considers that the evidence brought forth upon the rehearing shows clearly that the applicants did not return to the Indian Territory within the time specified in the decree of the Court of Claims rendered on February 3, 1895, in the case of Moses Whitmire, trustee, etc., *vs.* the Cherokee Nation et al.

The decision of the Commission to the Five Civilized Tribes is therefore affirmed, and the applications for the enrollment of John Freeman, Nettie Freeman, John H. Freeman, Elnora Freeman, Charlie Freeman, Jesse Freeman, Walter Freeman, Luther Freeman, Arizona Freeman, Ora Freeman, George Freeman, Carrie Freeman, Annie Freeman, Osa Freeman, Eliza Cannon, Mary Thompson, Clarence Thompson, Ethel Thompson, and Bessie Thompson as Cherokee freedmen are denied.

Respectfully,

J. E. W., *Assistant Secretary.*

Cherokee Freedmen D–458 et al.

DEPARTMENT OF THE INTERIOR,
COMMISSION TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory, June 16, 1905.

The honorable the SECRETARY OF THE INTERIOR.

SIR: There is herewith transmitted the record of proceedings had in the matter of the applications for the enrollment of John Freeman et al. as Cherokee freedmen, including the commission's decision, dated June 16, 1905, rejecting said applications.

On April 4, 1904, the department remanded this case for rehearing and readjudication.

Respectfully,

(Signed) TAMS BIXBY,
Chairman.

(Through the Commissioner of Indian Affairs.)

DEPARTMENT OF THE INTERIOR, COMMISSION TO THE FIVE CIVILIZED TRIBES.

In the matter of the application for the enrollment of John Freeman et al. as Cherokee freedmen, consolidating the applications of—

John Freeman et al	Cherokee freedmen D 458
George Freeman et al	Cherokee freedmen D 459
Osa Freeman	Cherokee freedmen D 460
Eliza Cannon	Cherokee freedmen D 612
Mary Thompson et al	Cherokee freedmen D 614

DECISION.

The record in this case shows that applications for enrollment as Cherokee freedmen were made to this commission by John Freeman for himself and wife, Nettie Freeman and minor children, John H., Elnora, Charlie, Jesse, Walter, Luther, and Arizona Freeman; thereafter, on April 21, 1902, there was filed with this commission an affidavit showing the birth on February 25, 1902, of Ora Freeman, child of the said applicants, John and Nettie Freeman; by George Freeman for himself and wife, Carrie Freeman, and minor child, Annie Freeman; by Osa Freeman for himself; by Eliza Cannon for herself; and by Mary Thompson for herself and minor children, Clarence, Ethel, and Bessie Thompson.

The record further shows that on July 1, 1903, the commission rendered its decision herein granting all the above-named applicants except Carrie Freeman, and denying the said Carrie Freeman, the right to enrollment as Cherokee freedmen, and that said decision was duly forwarded to the department; thereafter, on April 4, 1904 (departmental letter I. T. D. 842–04), on motion of the Cherokee Nation, the department reopened this case and returned same for further proceedings. Supplemental testimony in the matter of said applications was taken June 15 and 18 and July 16 and 29, 1904, at Muskogee, Indian Territory. Copies of the testimony taken June 1 and 5, 1901, at Chelsea, Indian Territory, its decision rendered by this commission on March 11, 1904, and departmental letter of December 3, 1904, in re applications of John J. Rose et al. and Emily Nolen et al., for enrollment as Cherokee freedmen, doubtful cases Nos. 474 and 511; and of the testimony taken July 2, 1901, at Nowata, Indian Territory, its decision rendered by this commission on July 23, 1904, and departmental letter of September 23, 1904, in re application of George Thompson, jr., for enrollment as a Cherokee freedman, Doubtful case No. D 1026, are filed herewith and made a part of the record herein.

The evidence in this case shows that the applicant, John Freeman, his former wife, Margaret Freeman, deceased, and his present wife,

the applicant, Nettie Freeman, were slaves of Cherokee citizens at the commencement of the rebellion, were removed from the Cherokee Nation during said rebellion, and did not return thereto and establish a residence therein within the time specified in the decree of the Court of Claims rendered on February 3, 1896, in the case of Moses Whitmire, trustee, etc., *vs.* The Cherokee Nation et al., for the return of Cherokee freedmen to said nation; that the applicant, Carrie Freeman, is the daughter of one John J. Rose, a noncitizen of the Cherokee Nation, and one Emily Nolen, was born since the commencement of the rebellion and possesses no rights to enrollment other than as a descendant of her said parents. In Cherokee freedman D 511, the commission has heretofore found that the said Emily Nolen possesses no rights to enrollment as a Cherokee freedman, and on December 3, 1904, its finding was approved by the department; and that all the other applicants herein were born since the commencement of the rebellion, are descendants of the said applicants, John, Nettie, and Carrie Freeman, and the said Margaret Freeman, deceased, and possess no rights to enrollment as Cherokee freedmen other than as such descendants. In Cherokee freedman D 1026, the commission has heretofore found that one George Thompson, jr., father of the applicants, Clarence, Ethel, and Bessie Thompson, possesses no rights to enrollment as a Cherokee freedman, and on September 23, 1904, its finding was approved by the department.

None of the applicants herein born during or prior to the first below-mentioned year, nor the ancestors of any applicant herein born during or subsequent to the said first below-mentioned year, can be identified on the Cherokee authenticated tribal roll of 1880, and none of the applicants herein can be identified on the Cherokee census roll of 1896.

It is claimed, on the part of the principal applicant herein, that he, his former wife, Margaret Freeman, and his present wife, Nettie Freeman, returned to the Cherokee Nation in the fall of 1866, in company with Moses Whitmire, Lewis Whitmire, Dennis Whitmire, and Sam Webber, and, in this statement he is corroborated by the testimony of Lewis Whitmire, Moses Whitmire, Sam Webber, Franklin Ross and George W. Vann.

The Cherokee Nation contends that said three parties first above named did not return to the Cherokee Nation until the winter or spring of 1868, and, in support of their contention, have filed with and made a part of the record in this case a copy of the testimony of Lewis Whitmire, Moses Whitmire, and Aaron Whitmire taken in 1878 before the Chambers Commission, only twelve years after the making of the treaty of 1866. These three witnesses were, at that time, applying for admission to citizenship in the Cherokee Nation, and were admitted. The personnel of the party who returned with them to the Cherokee Nation in 1866 was repeatedly gone into and neither the applicants nor their witnesses, nor the witnesses for the Cherokee Nation, identified John Freeman and family as being members of that party. It is not until Moses and Lewis Whitmire appear as witnesses in this case that they are able to remember that John Freeman returned with them in 1866. The testimony of Aaron Whitmire before the Chambers Commission in 1878, and before this com-

mission in 1901 and 1902, as to the time of their return, the number of trips made, and as to the members of the party returning, is thoroughly consistent and entitled to great weight.

The testimony of Martha E. Labrum, a disinterested witness, shows that John Freeman and family resided continuously near Fort Scott, Kansas, from March, 1866, until after October, 1867, and it will be noticed that the time of the departure of Freeman and his family from Kansas is identified in connection with an incident that would naturally impress her mind—the death of her grandfather—which occurred in October, 1867. The time of the applicant's departure from Kansas, as testified to by Martha E. Labrum, exactly corresponds with the time testified to by Aaron Whitmire of their arrival in the Cherokee Nation.

It is also a significant fact that most, if not all, the members of this party with whom John Freeman claims to have returned, were admitted to citizenship by the Chambers Commission and are identified upon the 1880 authenticated Cherokee roll. This is not true of John Freeman or of those members of his family who, it is claimed, returned and have ever since lived with this colony of freedmen.

The witnesses, Sam Webber, Franklin Ross, and George W. Vann, have testified in numerous freedmen cases and have been repeatedly and successfully contradicted, and their testimony is entitled to little credence.

It is, therefore, the opinion of this commission that the applications for the enrollment of John Freeman, Nettie Freeman, John H. Freeman, Elnora Freeman, Charlie Freeman, Jesse Freeman, Walter Freeman, Luther Freeman, Arizona Freeman, Ora Freeman, George Freeman, Carrie Freeman, Annie Freeman, Ors Freeman, Eliza Cannon, Mary Thompson, Clarence Thompson, Ethel Thompson, and Bessie Thompson, as Cherokee freedmen, should be denied, under the provisions of section twenty-one of the act of Congress approved June 28, 1898 (30 Stat., 495), and it is so ordered.

COMMISSION TO THE FIVE CIVILIZED TRIBES.
TAMS BIXBY, *Chairman.*
T. B. NEEDLES, *Commissioner.*
C. R. BRICKINRIDGE, *Commissioner.*

Dated at Muskogee, Indian Territory, this *Jun. 16, 1905.*

ITD. 842–1904.

DEPARTMENT OF THE INTERIOR,
Washington, April 4, 1904.

The COMMISSIONER OF INDIAN AFFAIRS.

SIR: Referring to the acting commissioner's communication dated January 29, 1904 (Land 60028–66134–1903), transmitting report of the Commission to the Five Civilized Tribes dated September 16, 1903, in the matter of the application of John Freeman and others for enrollment as Cherokee freedmen, there is inclosed, for your information and to be forwarded, departmental letter of even date to the commission remanding the case in accordance with the acting commissioner's recommendation.

(Signed) THOS. RYAN, *Acting Secretary.*

ITD. 842–1904.

APRIL 4, 1904.

COMMISSION TO THE FIVE CIVILIZED TRIBES,
Muskogee, Indian Territory.

GENTLEMEN: July 1, 1903, you rendered a decision in the Cherokee freedmen case of John Freeman and others in favor of most of the applicants.

July 2, 1903, the attorneys for the Cherokee Nation requested a rehearing in the case, alleging newly discovered evidence and stating what they expected to prove by witnesses named.

July 27, 1903, you denied the motion, stating that it was not shown that the nation could not, by the exercise of reasonable diligence, have discovered and produced the evidence sought to be introduced at one of the several hearings in this case.

September 17, 1903, the attorneys "appealed" from this action of your commission.

Submitting the case January 29, 1904, the Acting Commissioner of Indian Affairs recommended the nation be given an opportunity to submit further testimony.

It is the desire of the department to give the nation reasonable opportunity to produce any evidence it may desire in citizenship cases, and as it does not appear that the request in this case is unreasonable, the department concurs in the recommendation of the Indian Office, and hereby remands the case.

The testimony and papers attached thereto, and the motion of the nation for rehearing, are inclosed, together with a copy of the acting commissioner's letter.

Respectfully,

THOS. RYAN, *Acting Secretary.*

I. T. D. 8245–1903.

DEPARTMENT OF THE INTERIOR,
Washington, October 13, 1903.

COMMISSIONER OF INDIAN AFFAIRS.

SIR: There is inclosed herewith, for consideration in connection with the case when it reaches your office, a communication dated September 17, 1903, from L. B. Bell, W. W. Hastings, and J. S. Davenport, attorneys for the Cherokee Nation, transmitting an "appeal" and argument in the Cherokee freedman case of John Freeman et al.

Respectfully, (Signed) THOS. RYAN,
Acting Secretary.

DEPARTMENT OF THE INTERIOR, COMMISSIONER TO THE FIVE CIVILIZED TRIBES.

In the matter of the application for the enrollment of John Freeman et al. as Cherokee freedmen, consolidating the applications of—

John Freeman et al	Cherokee freedmen D 458.
George Freeman et al	Cherokee freedmen D 459.
Osa Freeman	Cherokee freedmen D 460.
Eliza Cannon	Cherokee freedmen D 612.
Mary Thompson et al	Cherokee freedmen D 614.

The record herein shows that applications for enrollment as Cherokee freedmen were made to this commission by John Freeman for himself, his wife, Nettie Freeman, and his minor children, John H., Elnora, Charlie, Jesse, Walter, Luther, and Arizona Freeman, and subsequent to the date of his application an affidavit was filed as to the birth of his minor child, Ora Freeman, and the same is made a part of the record herein, by George Freeman for himself, his wife, Carrie Freeman, and his minor child, Annie Freeman; by Osa Freeman for himself; by Eliza Cannon for herself; by Mary Thompson for herself and her minor children, Clarence, Ethel, and Bessie Thompson. Evidence taken at various times in the cases of Edward Wright, Aaron Webber, Joe Ross, Jefferson Ross, Elizabeth Meigs, and Samuel Beck is filed herewith and made a part of the record herein.

The evidence shows that John Freeman and his wife, Nettie Freeman, are the common ancestors through whom all the other applicants except George, Carrie, and Annie Freeman and Eliza Cannon, claim rights to enrollment as Cherokee freedmen; that George Freeman, Annie Freeman, and Eliza Cannon are descendants of John Freeman and his former wife, Margaret Freeman; and that all the applicants herein except John and Nettie Freeman were born since the commencement of the rebellion.

The evidence further shows that John Freeman, his former wife, Margaret Freeman, and his present wife, Nettie Freeman, were slaves of Cherokee citizens at the commencement of the rebellion; that during said rebellion they left the Cherokee Nation, but returned thereto prior to January 19, 1867.

There is no evidence showing that Carrie Freeman or any of her ancestors were slaves of Cherokee citizens, or free colored persons residing in the Cherokee Nation at the commencement of the rebellion. It further appears that her name is not found upon the 1880 authenticated Cherokee roll.

The evidence further shows that all the applicants herein, except Carrie Freeman, have resided in the Cherokee Nation from 1866, or from their birth where born thereafter, up to and including the date of their applications herein.

It is, therefore, the opinion of this commission that the application for the enrollment of Carrie Freeman, as a Cherokee freedman, should be denied, under the provisions of section twenty-one of the act of Congress approved June 28, 1898 (30 Stats., 495); and that John Freeman, Nettie Freeman, John H. Freeman, Elnora Freeman, Charlie Freeman, Jesse Freeman, Walter Freeman, Luther Freeman, Arizona Freeman, Ora Freeman, George Freeman, Annie Freeman, Eliza Cannon, Osa Freeman, Mary Thompson, Clarence Thompson, Ethel Thompson, and Bessie Thompson should be enrolled as Chero-

kee freedmen, under the provisions of section twenty-one above mentioned, and it is so ordered.

COMMISSION TO THE FIVE CIVILIZED TRIBES.
TAMS BIXBY.
T. B. NEEDLES.
C. R. BRECKENRIDGE.
W. E. STANLEY.

MUSKOGEE, INDIAN TERRITORY, *this July 1, 1903.*

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DEPARTMENT OF THE INTERIOR,
Washington, January 12, 1909.

Subject: Case of Moses Whitmire, trustee for freedmen of Cherokee Nation, v. Cherokee Nation and United States.

The ATTORNEY GENERAL.

SIR: Referring to my letter of November 12, 1908, in which I informed you that a copy of the supplemental petition in the case of Moses Whitmire, trustee for the freedmen of the Cherokee Nation, v. Cherokee Nation and the United States, had been referred to the Commissioner to the Five Civilized Tribes at Muskogee, Oklahoma, with instructions to furnish certain information in his possession, I have the honor to inclose herewith a certified copy of his reply thereto for your use in preparing the answer to the suit now pending in the Court of Claims.

Very respectfully,

JESSE E. WILSON,
Assistant Secretary.

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Oklahoma, November 20, 1908.

Subject: Case of Moses Whitmire, trustee for the freedmen of the Cherokee Nation, vs. the Cherokee Nation and the United States.

The honorable the COMMISSIONER OF INDIAN AFFAIRS.

SIR: This office is in receipt of your letter of November 11, 1908 (Land 71474–1908), inclosing a copy of the supplemental petition in the case of Moses Whitmire, trustee for the freedmen of the Cherokee , versus the Cherokee Nation and the United States, being cause No. 17209 in the Court of Claims. You state the petition was referred to the department by Honorable John Q. Thompson, Assistant Attorney General, "with request that he be furnished with all the facts, circumstances, and evidence in the possession and knowledge of the department touching the claim set forth in the petition," said request being made under section 188 of the Revised Statutes of the United States. This office is requested "to take up this petition as a special and make such report with reference to the making of the roll of Cherokee freedmen as will enable the Attorney General to make an answer to the petition, and return it to this office at your earliest convenience."

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For the purpose of this report the only paragraph of said supplemental petition requiring discussion is No. 6. It is admitted that the roll of Cherokee freedmen should have been made "in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six," in the case of Moses Whitmire, trustee for the freedmen of the Cherokee Nation, versus the Cherokee Nation and the United States, and of section 21 of the act of Congress approved June 28, 1898 (30 Stat., 495), and of the provisions of the act of Congress of July 1, 1902 (32 Stat., 716).

Section 25 of the act of July 1, 1902, provided that the roll of citizens of the Cherokee Nation should be made as of September 1, 1902, and that the names of all persons then living and entitled to enrollment on that date should be placed on said roll. Section 26 of said act provided that all persons living September 1, 1902, and entitled to be enrolled as provided in section 25 should be placed upon the roll, and that no child born thereafter to a citizen and no white person who intermarried with a Cherokee citizen since December 16, 1895, should be enrolled or should participate in the distribution of the tribal property of the Cherokee Nation. Section 27 of said act provides as follows:

"Such rolls shall in all other respects be made in strict compliance with the provisions of section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), and the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one)."

Section 21 of said act of June 28, 1898, provides, in part, as follows:

"That in making rolls of citizenship of the several tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take the roll of Cherokee citizens of eighteen hundred and eighty (not including freedmen) as the only roll intended to be confirmed by this and preceding acts of Congress, and to enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll to persons whose names are found thereon; and all persons who have been enrolled by the tribal authorities who have heretofore made permanent settlement in the Cherokee Nation whose parents, by reason of their Cherokee blood, have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may
219 have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to citizenship under Cherokee laws.

"It shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six."

In the making of the roll of Cherokee citizens the act of May 31, 1900, does not apply to Cherokee freedmen.

It appears plain, therefore, that the roll of Cherokee freedmen should be made "in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six." Such was the opinion of the Secretary of the Interior, under whose direction the law provided the roll of citizenship of the Cherokee Nation should be made, the Commission to the Five Civilized Tribes and the Commissioner to the Five Civilized Tribes.

Paragraph 6 of said supplemental petition reads as follows:

"Thereafter the said commission, commonly called the Dawes Commission, made up rolls of the citizens of the Cherokee Nation, but not in strict compliance with the provisions of section 21 of the act of Congress approved June 28, 1898 (30 Stat. L., 495), hereinbefore recited, nor in strict compliance with the decree of this honorable court passed in this cause February 3, 1896, and petitioner alleges that the particular in which it fails to conform to the said act of Congress and decree of this court, is that it has excluded from its rolls more than twelve hundred freedmen who were placed upon the rolls under the order and decree of this court of February 3, 1896, and their descendants, most of whom had also been on said authenticated rolls of 1880. Your petitioner further alleges that many of said freedmen who are thus wrongfully omitted from the rolls of said nation had taken homes upon the lands of said nation and improved them; that since the return of the said rolls on the Dawes Commission the Secretary of the Interior has denied their citizenship in the Cherokee Nation and has denied their right to the continued possession and enjoyment of their said homes and their right to participate in the allotment of said lands and the distribution of said funds and assets, and has in many cases allotted the homes of such individual freedmen to other members of the Cherokee Nation and has ousted many of such freedmen from their homes and is now preparing to oust the remainder of said freedmen from their said homes, all of which he will carry into effect unless he is prevented by appropriate order of this honorable court. Your petitioner further alleges that in the allotment and distribution made or preparing to be made by the Secretary of the Interior, as hereinbefore set out, said freedmen are and will be excluded from any participation whatever in the lands, assets, and funds of the Cherokee Nation in disregard of the said acts of July 1, 1902, June 28, 1898, and in violation of the injunction contained in the decree of this honorable court passed February 3, 1896, which provides that 'in the distribution of the proceeds and avails of the public domain or common property of the nation among the citizens thereof by distribution per capita at any time hereafter, the defendant, the Cherokee Nation, and the defendant, the United States, as trustee of the Cherokee Nation, be enjoined and prohibited from making any discrimination between the Cherokee citizens
220 of Cherokee blood or parentage and Cherokee citizens who are or were freedmen, etc.'

"The premises considered, your petitioner prays that this honorable court will pass a decree declaring the action of the said Dawes Commission and the Secretary of the Interior, whereby the names of said freedmen were excluded from the roll and citizenship of the Cherokee Nation, be declared to be unlawful, and further enjoining and prohibiting the defendants, the Cherokee Nation, and the United States, as trustees for the Cherokee Nation, from making any discrimination between the said freedmen and other citizens of the Cherokee Nation in the allotment of lands and distribution of the said property and assets of said nation, and further enjoining the said defendant, and particularly the United States acting through the Secretary of the Interior, from further disturbing said freedmen in the possession and occupation of their said home and improvements, and further enjoining upon the said defendant, the United States, acting through the Secretary of the Interior, to reinstate such of said freedmen as have heretofore been ousted from the occupancy and possession of their said homes and improvements."

It will be noted that the only particular in which the petition alleges the roll of Cherokee citizens was not made "in strict compliance with the provisions of section 21 of the act of Congress approved June 28, 1898," or "in strict compliance with the decree of this honorable court passed in this cause February 3, 1896," is that "it has excluded from its roll more than twelve hundred freedmen who were placed upon the rolls under the order and decree of this court of February 3, 1896, and their descendants, most of whom had also been upon said authenticated rolls of 1880."

The parts of the decree of the Court of Claims in direct point are the following:

"And it appearing to the court that under the provisions of article 9 of the treaty of July 19, 1866, made by and between the Cherokee Nation and the United States, the said freedmen, who had been liberated by voluntary act of their former owners or by law, and all free colored persons who resided in the Cherokee country at the commencement of the rebellion and were residents therein at the date of said treaty, or who had returned thereto within six months of said last-mentioned date, and their descendants, were admitted into and became a part of the Cherokee Nation and entitled to equal rights and immunities and to participate in the Cherokee national funds and common property in the same manner and to the same extent as Cherokee citizens of Cherokee blood. * * *

"It being understood that the freedmen and their descendants and free colored persons above referred to shall include only such persons of said class as have not forfeited or abjured their citizenship of said Cherokee Nation at the date of the entering of this decree. * * *

"And it is further ordered and adjudged that, for the purpose of ascertaining and determining who are the individual freedmen of the Cherokee Nation now entitled to share in the distribution of the said sum of $903,365, the Secretary of the Interior be authorized to appoint three commissioners, one on the nomination of the complainant, and one on the nomination of the defendant, the Cherokee Nation, but

both nominations to be approved by him, to proceed to the Cherokee country and hear the testimony both for and against the identity of all freedmen, free colored persons, and their descendants, claiming to be entitled to share in the distribution of said $903,365, that may be offered by the respective parties to this suit; and that each of said parties shall be entitled to be represented before said commissioners, either at the taking of testimony in the Cherokee country or elsewhere; and that the said commissioners, in ascertaining the identity of the freedmen entitled to share under this decree, shall accept what is known as the authenticated Cherokee roll, the same now being on file in the office of the Secretary of the Interior, having been furnished to him and purporting to have been taken by the Cherokee Nation in 1880 for the purpose of showing the number of freedmen then entitled to citizenship in the said nation under the terms of the treaty between the United States and the Cherokee Nation hereinbefore referred to, and their descendants; and the said commissioners shall ascertain who of said persons named on said rolls were alive and what descendants of said persons were alive on May 3, 1894, and no evidence shall be accepted by said commission tending to disprove the citizenship of any of the persons whose names appear upon said roll."

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The statement contained in paragraph 6, to the effect that the "Dawes Commission has excluded from its rolls more than twelve hundred freedmen who were placed upon the rolls under the order and decree of this court of February 3, 1896, and their descendants, most of whom had also been on said authenticated rolls of 1880," is incorrect and misleading, for the following reasons:

First. The "twelve hundred freedmen who were placed upon the rolls under the order and decree of this court" who were "excluded from the rolls" of the Dawes Commission, is presumed to refer to persons claiming Cherokee freedmen citizenship who were denied the right of enrollment by the Secretary of the Interior, and whose names appear upon the Kern-Clifton roll. Such persons were not "placed upon the rolls under the order and decree" of the Court of Claims, nor were they found by the Court of Claims to be entitled to final citizenship in the Cherokee Nation. Under the court's decree a roll of said "freedmen and free colored persons aforesaid and their descendants" was to be made by a commission appointed by the Secretary of the Interior, and by that commission the "Kern-Clifton" roll was prepared. The decree made no provision for review by the Court of Claims of the proceedings of that commission, or for approval of the roll by the court, and on the contrary the commission was directed to report its roll, not to the court but to the Secretary of the Interior, and when it was approved by him the fund in control of the court was to be paid to the persons borne on the roll. The court decreed the class of freedmen and free colored persons, and not the individuals who were entitled to Cherokee citizenship, and to reason otherwise would be on the theory that the court delegated its judicial power to said commission and the Secretary of the Interior, which power the court could not delegate. The Congress did not regard

enrollment upon the Kern-Clifton roll as an adjudication of right of the persons borne on that roll to final citizenship seems clear from the passage of the act of June 28, 1898, which provided that the Commission to the Five Civilized Tribes "shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and
222 ninety-six." That Congress so regarded such enrollment is further shown by the fact that the Kern-Clifton roll was not confirmed by Congress, as were other tribal rolls, among which is the 1880 Cherokee tribal roll above referred to.

Second. The commission, and the commissioner, to the Five Civilized Tribes and the department have always accepted the roll of 1880, made by the Cherokee Nation, as conclusive of the right to enrollment of all persons whose names are found thereon and their descendants, and have considered their only duty in relation to those persons to ascertain who of the persons named on the roll and their descendants were alive, and to place their names on the roll, omitting those who have forfeited or abjured their citizenship in the Cherokee Nation. None of the "twelve hundred freedmen" referred to, presuming that they are of the class mentioned, are identified on the 1880 Cherokee tribal roll, unless they be such as have "forfeited or abjured their citizenship" since 1880.

In instructions received May 14, 1900, by the Commission to the Five Civilized Tribes from the Secretary of the Interior, the Secretary advised the commission that:

"The roll of 1880, made by the Cherokee Nation, is to be accepted by you as conclusive of the right of all persons whose names are found thereon and of their descendants to be enrolled by you. Your only duty in relation thereto is to ascertain who of the persons named therein are alive and who of their descendants are alive, and place their names on your roll, omitting, however, all who have forfeited or abjured their citizenship."

And that—

"It was intended that a full and complete roll should be made that should include the names of all freedmen, free colored persons, and their descendants, entitled to be recognized as citizens of the Cherokee Nation. It is your duty now to make such a roll, which shall include the names of all Cherokee citizens who are or were freedmen, who had been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the Cherokee country at the commencement of the rebellion, and were residents therein at the date of said treaty, or who returned thereto within six months thereafter, and their descendants."

The Commission to the Five Civilized Tribes, therefore, received applications for the enrollment of all persons claiming citizenship in the Cherokee Nation as "freedmen, who had been liberated by voluntary act of their former owners or by law, and all free colored persons who resided in the Cherokee country at the commencement of the rebellion, and were residents therein at the date of said treaty, or

who had returned thereto within six months of said last-mentioned date, and their descendants," and decided each case according to the evidence introduced, and in receiving and deciding the cases the commission accepted "what is known as the authenticated Cherokee roll * * * taken by the Cherokee Nation in 1880 for the purpose of showing the number of freedmen then entitled to citizenship in said nation," and no evidence was accepted "tending to disprove the citizenship of any of the persons whose names appear upon said roll," the proper precaution being taken, however, to see that the roll "shall include only such persons of said class as have not forfeited or abjured their citizenship of said Cherokee Nation," and to de-
223 termine who were living on September 1, 1902, as provided by the act of July 1, 1902.

The act of April 26, 1906 (34 Stat., 137), contains the following provision:

"The roll of Cherokee freedmen shall include only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants, who were actual personal bona fide residents of the Cherokee Nation August eleventh, eighteen hundred and sixty-six, or who actually returned and established such residence in the Cherokee Nation on or before February eleventh, eighteen hundred and sixty-seven; but this provision shall not prevent the enrollment of any person who has heretofore made application to the Commission to the Five Civilized Tribes or its successor and has been adjudged entitled to enrollment by the Secretary of the Interior."

After the passage of this act, due consideration was given this provision in the determination of cases since acted upon.

Section 11 of said act of July 1, 1902, provides that—

"There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee Tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements."

In the allotment of the lands of the Cherokee Nation there has been no "discrimination between the Cherokee citizens of Cherokee blood or parentage and Cherokee citizens who are or were freedmen who had been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the Cherokee country at the commencement of the rebellion and were residents therein at the date of said treaty or who returned thereto within six months thereafter, and their descendants," who were found to be entitled to enrollment and whose names were placed upon the roll of Cherokee citizens which has been approved by the Secretary of the Interior.

Those claimants for citizenship in the Cherokee Nation whose applications were denied have not, of course, been allotted land in the Cherokee Nation. Such claimants were, prior to the rejection of

their applications for enrollment, permitted to make tentative allotment selections so as to protect their improvements and interests pending the final determination of their right to enrollment. After the final rejection of their applications, their tentative allotment selections were canceled.

Relative to the allegation in paragraph 6 of said supplemental petition, to the effect that the Secretary of the Interior "has in many cases allotted the homes of such individual freedmen to other members of the Cherokee Nation and has ousted many of such freedmen from their homes and is now preparing to oust the remainder of said freedmen from their said homes, all of which he will carry into effect unless he is prevented by appropriate order of this honorable court," and to the prayer:

"* * * that this honorable court will pass a decree declaring the action of the said Dawes Commission and the Secretary of the Interior whereby the names of the said freedmen were excluded
224 from the roll and citizenship of the Cherokee Nation be declared to be unlawful, and further enjoining and prohibiting the defendants, the Cherokee Nation, and the United States, as trustees for the Cherokee Nation, from making any discrimination between the said freedmen and other citizens of the Cherokee Nation in the allotment of lands and distribution of the said property and assets of said nation, and further enjoining the said defendant, and particularly the United States, acting through the Secretary of the Interior, from further disturbing said freedmen in the possession and occupation of their said home and improvements,"

it is probable that most, if not all, of the land held by freedmen claimants who were rejected has been allotted to duly enrolled citizens of the Cherokee Nation. The Secretary of the Interior and the officials under his direction have not "ousted" freedmen claimants "from their homes," nor are they "now preparing to oust the remainder of said freedmen (claimants) from their said homes." On the other hand, the Secretary of the Interior long ago instructed the United States Indian agent who has jurisdiction, under the direction of the Secretary of the Interior, of the matter of placing allottees in the Cherokee Nation in the possession of their allotments (see section 21 of the act of July 1, 1902) to not proceed to remove from land in the Cherokee Nation claimants for enrollment as Cherokee freedmen whose claim for citizenship was in any wise pending, nor is any action now being taken by the United States Indian agent to place Cherokee allottees in possession of land now being held by persons who claimed freedmen citizenship in the Cherokee Nation whose enrollment was denied, but who may be parties to or affected by this case.

A copy of the supplemental petition is returned herewith.

Respectfully,

J. G. WRIGHT, *Commissioner.*

JOR(LS)
Incl. S–14.

225

DEPARTMENT OF THE INTERIOR,
Washington, October 26, 1909.

The CLERK OF THE COURT OF CLAIMS,
Washington, D. C.

SIR: Referring to the communications from your office, dated May 21, 1909, and June 25, 1909, requesting for the use of the Court of Claims, in the above-mentioned case, certain information in regard to the persons whose names appear on the Kern-Clifton rolls of Cherokee freedmen, there is enclosed a certified copy of a report of August 30, 1909, from the commissioner to the Five Civilized Tribes, and of the lists transmitted therewith.

Very respectfully,

FRANK PIERCE,
First Assistant Secretary.

DEPARTMENT OF THE INTERIOR,
COMMISSIONER TO THE FIVE CIVILIZED TRIBES,
Muskogee, Oklahoma, August 30, 1909.

The honorable the SECRETARY OF THE INTERIOR.

SIR: I have the honor to transmit herewith certain lists embodying the information requested by the assistant clerk of the Court of Claims in his letter of May 21, 1909, transmitted to this office by the department on May 27, 1909 (Land 39497–1909, J. E. D.).

The information sought by the Court of Claims is in connection with the case of Moses Whitmire, trustee, v. The United States and Cherokee Nation, and is embraced under four heads:

(1) A list of the names of all Cherokee freedmen whose names appear on the Kern-Clifton roll and do not appear on the roll of the Dawes Commission as finally approved March 4, 1907.

(2) Copies of decisions of the commission that any person whose name is on the Kern-Clifton roll abjured or forfeited his citizenship in the Cherokee Nation after May 3, 1894.

226 (3) The names of those freedmen on the Kern-Clifton roll and not on the Dawes roll who died between May 3, 1894, and March 3, 1907.

(4) The names of all children born between May 3, 1894, and March 3, 1907, to those freedmen whose names are on the Kern-Clifton roll and not on the Dawes roll.

On June 2, 1909, I called attention to the fact that the records of the office were incomplete as to the data required in paragraphs 3 and 4, and on June 29, 1909 (Land 49995–1909, J. E. D.), I was directed to submit with my report as complete information in the matter as may be obtained from the records of this office.

There are, therefore, transmitted lists showing the information sought in paragraphs 1, 3, and 4, so far as can be obtained from the records of this office.

The decisions in all cases of applicants whose names are found on the Kern-Clifton roll and whose enrollment was denied by the depart-

ment have been examined, and in no case has it been found as a part of any such decision that the applicant forfeited or abjured his or her citizenship after May 3, 1894. In probably ninety per cent of these cases the applicant was denied for the reason that he was found not to have returned to the Cherokee Nation within the time required by the treaty of 1866.

Lists 3 and 4 are necessarily incomplete as stated, for the reason that the office has no information whatever as to the death of these persons between May 3, 1894, and the time of the beginning of the work of enrollment in 1900, and in but few cases has authentic information as to the death of persons whose applications for enrollment were denied.

It is also probable that many children were born to these persons for whom no application for enrollment was made and of whose birth the office consequently has no record, and as no person was entitled to enrollment who was born subsequent to March 4, 1906, there is no record of the birth of any children between this date and March 4, 1907.

List No. 1, which is the most important item, has been made with the greatest accuracy possible under existing circumstances. To make this list authentic in every particular it would require a field investigation and the taking of testimony from the persons whose names appear on this roll, and as this could not have been completed within the time it was necessary that the data be placed before the court the list was prepared from a careful comparison of the two rolls and other records available pertaining to the enrollment of the parties, so that it is believed it is practically correct. It is found, however, that in many cases the same name appears twice on both rolls, and frequently it was difficult, if not impossible, to determine the names on either roll belonging to the same person.

There are also a great number of apparent duplications on the Kern-Clifton roll, beside which, in many instances, the same person appears on the Kern-Clifton and the commission rolls under different names, but every effort was made to ascertain the true facts in all such cases, and it is believed that the result will be found satisfactory.

In preparing this information it was found that a number of freedmen whose names appear on the commission roll and also on the 1880 authenticated roll of Cherokee citizens did not appear on the Kern-
227 Clifton roll, and for the information of the department a list of these persons was made and is also transmitted.

The communications of the clerk of the Court of Claims of May 21 and June 25 are respectfully returned herewith.

Respectfully,

J. GEO. WRIGHT,
Commissioner.

WSDM (LBA). Encl. 30–1.
Through the Commissioner of Indian Affairs.

List of freedmen whose names appear on the Kern-Clifton roll and are not identified on the final roll of freedmen citizens of the Cherokee Nation approved by the Secretary of the Interior March 4, 1907.

Name.	Kern-Clifton No.
Alberty, Carrie	3
Burgess, William	34
Anderson, Jane, née Burgess	38
Hall, Amanda, née Daniels	54
Rowe, Louis	82
Rowe, Chaney	83
Buffington, Florence	86
Buffington, Ishmas	87
Buffington, Henrietta	88
Vann, Sank (or Sam)	124
Vann, Albert	129
Lynch, Fredonia	136
Thompson, Ellen	140
Thompson, Hamay	141
Thomas, Stella	144
Ross, Lizzie	146
Ross, Tom	150
Foster, Lavinia, alias Mary	158
Foster, Martha	162
Foster, Sue	164
French, Linda	166
Downing, Lou	182
Kirk, Emma	185
Sanders, Polly	193
Foster, Jetta	208
Coody, Louis	214
Taylor, Mary	235
Taylor, Fred	236
Taylor, Henry	239
Lasly, Geo. W	256
Lasly, Clara	259
Williams, Judy	270
Foster, Cora	276
Bean, Maud	285
Vann, Melzy	298
Vann, James	302
Martin, Ralph	313
Vann, Took	319
Frye, Viola	326
Frye, Harvey	330
Bryan, Nancy	341
Weber, Davis	348
Weber, George Henry	351
Whitmire, Dick	357
Whitmire, Walter	358
Murrell, Sarah	361
Murrell, Daisy	362
Murrell, Susan	369
Vann, Eli	373
Vann, Polly, née Rider	374
Rider, Lena	380
Rider, Mabel	382
Rider, Frank	383
Leek, Albert	398
Bean, Ebey	403
Williams, Arthur	418
Landrum, Clida	433
Landrum, Fravies	434
Landrum, Sam	439
Sutton, Sallie	441
Lampton, Eliza, née Adair	446
Hughes, Sarah	452
Landrum, Andy	464
Landrum, Lone	465
Bean, Evey	479
Lynch, Martha	507
Vann, Sarah	514
Bean, Rufus	516
Eaton, Lucy	520
Eaton, Loney	521
Johnson, Rachel	533
Dennis, Isabel	547
Dennis, Bertha	548
Dennis, Laura	549
Dennis, Amanda	550
Dennis, Clem	553
Adams, Cora	557
Adams, Grant, alias Emanuel	560
Adams, Cora, duplicate of No. 557	562
Adams, Grant, duplicate of No. 560	565
Adams, Jesse	566
Foreman, Lester	543
Nave, Flora	574
Gibson, Luther	575
Vann, William	577
Vann, Alice, or Sarah	578
Landrum, or Johnson, Sidney	583
Johnson, John	586
Chambers, Charles	589
Brown, Jesse	601
Brown, Lucinda	602
Brown, Lubertha	604
Brown, Oce	606
Brown, Mary	608
Grimmett, Cora	615
Grimmett, Lewis	618
Ward, William	629
Vann, Upton	634
Pack, Willie	639
Peterson, Josie, née Whitmire	655
Nave, William	688
Moore, John	695
Nave, Rosella	701
Rogers, Nick	711
Martin, Elizabeth	716
Whitmire, Kate	723
Nave, Lucinda	735
Wright, Lucinda	745
Vann, Sam	750
Weber, Rosie	762
Rateliffe, Eliza	785
Rider, Lucy	787
Vann, Henry	806
Vann, Lamon	814
228 Woodward, James	820
Martham, Willis	837
Ross, Ruth	853
Vann, George	859
Rogers, Lizzie (wife of Ben Vann)	860
Wright, Louis	877
Anderson, Hannah	899
Vann, Jennie	893
Anderson, Lucy	900
Rogers, Sydney	901
Webber, Dug	908
Webber, Amanda	910
Stidman, Dolly	913
Stidman, Tom or Will	915
Johnson, Mary	918
Lasly, Andy	937
Thornton, Nancy	951
Jones, May	964
Sheppard, Thomas	971
Beck, James	975
Beck, Jennie	977
Grimmett, Lillie	984
Nevins, John	990
Tucker, Nannie	1006
Riley, Louisa, duplicate of No. 2199	1007
Riley, Dave, duplicate of No. 2200	1008
Ross, Ruth	1021
Fields, William	1035
Mackey, Amanda	1036
Austin, Louis	1039
Tyner, Nancy, née Nevins	1044
Tyner, Ed	1045
Tyner, Jessie	1046
Smith, Esther, née Vann	1049
Walker, Violet, now Ross	1054
Brewer, Andrew	1062
Brewer, Fannie	1063
Schrimsher, Maud	1064
Schrimsher, Mary	1065
Brown, John	1076
Walker, John	1089
Walker, Ada	1090

List of freedmen whose names appear on the Kern-Clifton roll, etc.—Continued.

Name.	Kern-Clifton No.
Lowery, Jeannett	1105
Smith, Tenah	1112
Vann, David	1116
Williams, Henry	1122
Alberty, Delilah	1131
Alberty, Ruben	1133
Wilson, Isaac	1138
Wilson, Peggie	1141
Davis, Abe	1148
Davis, Will	1149
Parks, Nellie	1170
Parks, Mack	1171
Nevins, Patsy	1180
Vann, Butler	1181
Vann, Derce	1187
Thompson, Peg, née Vann	1203
Ford, Carrie, née Brewer	1220
Sanders, Norah	1222
Sanders, Sarah	1223
Lee, Annie	1227
Nave, Henry	1228
Thompson, Rube	1237
Johnson, Aaron	1253
Cornish, Tom	1255
Thompson, Mose	1257
Mackaye, Crockett	1258
Sheppard, Wash	1263
Sheppard, Curtis	1265
Mayfield, Nellie	1269
Mackey, Jennie	1277
Bean, Mary	1291
Ross, Mary	1303
Aldrich, Dennis	1328
Fin, Sarah, née Bean	1330
Petitt, Eben	1337
Humphries, Bessie	1342
Hudson, Emma	1345
Vann, Ed	1356
Vann, Judy	1357
Thompson, Esther	1358
Johnson, Aaron, duplicate of No. 1253	1387
Johnson, Emmett	1388
Mackey, Alice	1392
Brown, Josephine	1404
Brown, Joseph	1409
Vann, Solomon	1410
Vann, Dennis	1411
Vann, Jeanna	1412
Vann, or Young, Gus	1424
Vann, William or Jacob	1428
Vann, Rachel	1435
Vann, Walter	1444
Vann, Crow	1447
Vann, Rose	1448
Landrum, Cudge or Carrie	1456
Landrum, Clarence	1457
Landrum, Joe	1458
Coody, Lydia	1469
Keys, Dora	1490
Keys, Phoebe	1494
Thompson, Cora, née Carter	1500
Carter, Will	1501
Drew, Willie	1523
Drew, Allie	1524
Drew, Gussie	1525
Drew, Jennie	1526
Smith, Ibby	1529
Smith, Wash	1530
Crossland, Abe	1543
Crossland, Morris	1549
Ford, Julia, née Vann	1553
Ford, Nan	1554
Shepard, Sue	1567
Foreman, Delilah	1575
Brown, Fannie	1586
Brown, Robert	1588
Whitmire, Turner	1592
Whitmire, Polly	1594
Whitmire, Ella	1595
Johnson, Frank	1598
Johnson, Harvey	1601
Drew, Henrietta	1616
Mackey, Kate	1626
Snow, Willie	1636
Glass, Millie, or Foreman	1653
Laface, Jake	1671
Schrimsher, Fred	1672
Schrimsher, William	1678
Mackey, Perry, jr	1682
Jones, Mary, née Mackey	1683
Baldridge, Peter	1687
Brewer, Frances	1690
Brewer, Catherine	1691
Crossland, Ella	1694
Vann, Lucinda, née Sheppard	1701
Webber, Bertha, duplicate of No. 794	1713
Nave or Watson, Cora	1722
Nave or Watson, Jane	1723
Nave or Watson, Dave	1724
Nave or Watson, Walter	1725
Taylor, Patsy	1727
Crossland, Sally, née Vann	1730
Crossland, Lula	1731
Riley, Sol	1761
Riley, Lucinda	1762
Riley, Charles	1770
Riley, William	1768
Drew, William	1795
Walker, Lizzie, née Drew	1797
Crapo, Butler	1806
Fields, Mary	1808
Fields, Emma	1809
Benge, Neg	1821
Wright, Maggie	1829
229 Shoate, George	1838
Shoate, Sam	1839
Crapo, Eva	1847
Beck, Alex	1853
Crapo, Joanna	1875
Mayes, Mary, née Forman	1881
Mackey, Mose	1886
Alberty, Irvin	1894
Alberty, Mollie	1895
Ross, Ellis	1899
Vann, Charles	1900
Parris, Henry	1911
Brown, Francis, duplicate of No. 1690	1933
Ross, Laura	1955
Irons, Jerry	1966
Irons, Ned	1970
Ross, Ann	1980
Ross, Lucy, née Whitmire	1990
Dydas, Rachel, née Grimmett	1995
Johnson, Maud	2004
Fields, Simon	2006
Fields, Simon	2008
Ross, John	2013
Fields, Mary	2016
Johnson, Evan	2017
Warford, Sam	2032
Warford, Ed	2034
Warford, Jim	2035
Warford, Melzie	2043
Johnson, Sidney, duplicate of No. 583	2045
Johnson, Johnson, duplicate of No. 586	2046
Keys, Louis	2063
Eagle, Kathleen	2066
Irons, Dora	2078
Carter, Maria	2081
Carter, Dick	2084
Carter, Calvin	2085
Sheppard, Josh	2089
Sheppard, Andrew	2090
Sheppard, Samuel	2091
Sheppard, Nancy	2092
Sheppard, Joel	2094
Whitmire, Fannie	2100
Whitmire, Alice	2106
Petitt, Will	2117
Smith, Joe	2124
Hicks, Phoebe	2129
Fields, Kate	2172

List of freedmen whose names appear on the Kern-Clifton roll, etc.—Continued.

Name.	Kern-Clifton No.
Fields, Abe	2173
Walker, Violet Ross, duplicate of No. 1054	
Williams, David	2187
Williams, Lou, née Riley	2198
Williams, Davis	2199
Theadore, Edward	2200
McCracken, Samuel	2224
Wilson, Sarah	2247
Campbell, Sophia	2248
Lipe, Jack	2253
Johnson, Sarah	2259
Johnson, Mary	2274
Johnson, Lula	2277
Mays, Berry	2278
Lowrey, Chaney, née Collins	2282
Johnson, Lincoln	2285
Parris, Amanda, née Griffin	2299
Gentry, Frances, now Parris	2302
Martin, Wilson	2310
Johnson, Luella	2332
Benton, Sam	2346
Benton, Eddie	2352
Benton, Tom	2353
Depey, Tobie	2354
Whitmire, Jess	2356
Whitmire, Jim	2380
Whitmire, Matt	2381
Johnson, Hannah	2382
Chase, Sanie	2390
Johnson, Malissa	2227
Price, Ella	2391
Price, Emma	2402
Davis, Eliza, née Jones	2403
Skates, Ruth	2406
Nincan, Tom	2431
Alberty, Josh	2432
Alberty, Mable	2433
Leak, Ed, sr	2434
Alberty, James	2445
Alberty, Lolo	2449
Daniels, Ransom	2452
Carter, Henry	2454
Carter, Tena	2460
Carter, George	2461
Carter, Mary	2462
Blanket, Saddle	2463
Saddle Blanket, Katie	2465
Johnson, James	2466
Johnson, Matt	2469
Scales, Jennie, née Theadore	2470
Frog, Tobacco Will	2471
Smith, Delilah	2472
Smith, Wash	2486
Nave, Charles	2487
Naves, Charles, duplicate of No. 685	2488
Foster, Rebecca	2489
Foster, Jennie	2500
Mayfield, John	2502
Meigs, Peter	2510
Meigs, Eliza	2511
Meigs, Mary	2512
Beck, Dona	2513
Beck, Harvey	2515
Meigs, Alice	2516
Meigs, Simon	2517
Meigs, Nathan	2519
Meigs, Hattie	2520
Meigs, Kate	2521
Meigs, Turner	2522
May or Landrum, Callus	2523
May or Landrum, Millie	2524
Whitmire, Daniel	2525
Fox, Esau	2526
Fox, Nancy	2527
Fox, Angeline	2528
Fox, Eliza	2529
Fox, Ollie	2530
Fox, Joe	2531
Fox, Arthur	2532
Fox, Hattie	2533
	2534

Name.	Kern-Clifton No.
Mays, Susan	2536
Mays, Dave	2537
Martin, Fred	2540
Gibson, Louis	2544
Gibson, Napoleon	2545
Gibson, Will	2546
Hayden, Maria	2553
Buckner, Arthur	2554
Buckner, George	2555
Buckner, Sarah	2556
Buckner, Ella	2557
Davis, Jack	2567
Davis, Carrie	2568
Davis, John	2569
Blackburn, Ellen	2570
Davis, Will	2571
Bowlen, Arelia	2575
Allen, George	2583
Rogers, Isaac	2587
Rogers, Eddie	2588
May, Martha	2589
May, Amanda	2590
Rogers, Florence	2591
Rogers, Clyde	2592
McIntosh, Malisa	2594
230 McIntosh, Bertha	2595
McIntosh, Bennie	2596
Ross, Julia	2603
Ross, Patsy	2604
Grayson, Clara	2605
Grayson, Louisa	2606
Grayson, Mary	2607
Grayson, George	2608
Grayson, Garfield	2609
Grayson Lucy	2610
Markham, Addie	2612
Rider, John	2613
Wright, Savilla	2620
Wright, Louis, duplicate of No. 877	2623
Vann, Isaac	2624
Scott, Carrie	2629
Grimmett, Joe	2632
Eastman, Isaac	2633
Vann, Sam	2642
Johnson, Israel	2643
Vann, Frank	2650
Smith, Lucinda	2655
Smith, Willie	2656
Smith, Amanda	2657
Smith, Bell	2658
Smith, Annie	2659
Smith, Lizzie	2660
Smith, Kate	2661
Smith, Fannie	2662
Smith, George	2663
Ross Amanda	2664
Martin, Jennie	2667
Jenkins, George	2672
Mackey, Leroy	2681
Mackey, Floyd	2682
Smith, Annie	2684
Smith, Ida	2685
Ford, Rhoda	2687
Ford, Joe	2689
Ford, Frank	2690
Ford, Wilson	2691
Jones, Annie	2692
Jones, Nancy	2693
Jones, George	2694
Mackey, Alice	2695
Tyner, John	2705
Fields, W. H	2707
Fields, Elias	2708
Rankin, Wren	2709
Rankin, Nat	2710
Rankin, Birdie	2711
Rankin, Tom	2712
Gentry, Eli	2713
Gentry, Arizona	2714
Gentry, Bernice	2715
Gentry, Ellis	2716

List of freedmen whose names appear on the Kern-Clifton roll, etc.—Continued.

Name.	Kern-Clifton No.
Gentry, Ed	2717
Vann, Nancy	2719
Vann, Henry	2720
Gales, Mattie	2726
Brown, Susie	2729
Williams, Ed	2741
Humphries, Nancy	2746
Humphries, Tom	2747
Humphries, Will	2748
Humphries, Gentry	2749
Dean, Mary	2750
Humphries, Joe	2751
West, Dave	2752
West, Ollie	2769
West, Harriet	2773
West, Sylvester	2774
West, John	2775
West, Julia Ann	2776
West, Joe	2777
West, Nancy	2778
West, Boston	2785
West, Lillie	2786
West, Jennie	2787
West, Bill	2788
West, Bud	2789
Wilson, Irene	2795
Jones, Wenona	2796
Jones, Lillie	2797
Polston, Riley	2799
Keys, Aleck	2800
Beck, George	2805
Beck, Joe	2806
Beck, Lizzie	2808
Beck, Lottie	2810
Bryant, Ephraim	2812
Bryant, Eliza	2813
Bryant, Minta	2814
Bryant, Sherman	2815
Bryant, Bertha	2816
Bryant, Ella	2817
Choate, Ed	2818
Brown, Jeff	2819
Hildebrand, Isaac	2820
Warner, Stephen	2822
Markham, Harriet	2823
Brown, Leah	2824
Brown, John	2826
Chambers, Mose	2830
Parker, Mary	2837
Parris, Sarah	2844
Lee, Polly	2859
Hardwick, Mose	2864
Hardwick, Louis	2865
Lowning, Amos	2866
Lowning, Zack	2867
Hardwick, Eliza Jane	2868
Hardwick, Mary	2869
Hardwick, Nelson	2870
Hardwick, Malinda	2871
Hardwick, Will	2872
Hardwick, Cyrus	2873
Hardwick, Sarah	2874
Lynch, Arthur	2875
Lynch, Ethel	2876
Lynch, Mattie	2877
Lyons, Ned	2878
Lyons, Elias	2879
Lyons, Rachel P	2880
Lyons, Willie	2881
McNair, Cheney	2892
Richardson, Willie	2895
McGee, Rachel	2896
McGee, Tom	2897
McGee, Ethel	2898
Martin, Payton	2899
Shelton, Mollie	2900
Shelton, Lillie	2901
Shelton, Eva	2902
Shelton, Alice	2903
Shelton, George	2904
Shelton, Annie	2905
Martin, Rachel	2913
Downing, Josh	2918
Jones, Elizabeth	2919
Mayfield, Tom	2921
Vann, Nann	2922
Mayfield, Louisa	2923
Blackburn, Charles	2924
Blackburn, John	2925
Blackburn, Nora	2926
Blackburn, Charles	2927
Blackburn, Carrie	2928
Blackburn, Bud	2929
Blackburn, Sarah	2930
Blackburn, Julia	2931
Mayfield, Charles	2932
Mayfield, Emma	2933
Mayfield, Malinda	2934
231 Mayfield, Richard	2935
Mayfield, Lillie	2936
Mayfield, Tom	2937
Mayfield, Alsie	2938
Martin, Vada	2943
Martin, Jessie	2944
Martin, Henry	2949
Martin, Rosa	2952
Bean, Mary	2967
Hicks, Joe	2972
Hicks, Jim	2973
Hicks, Kate	2974
Hicks, Eliza	2975
Hicks, Leroy	2976
Hicks, Dennis	2977
Hicks, Delaney	2978
Hicks, Mabel	2979
Hicks, Elmer	2980
Irons, Alex	2981
Townsend, Will	2982
Melton, Phoebe	2983
Melton, Rose	2984
Melton, Joe	2985
Melton, Percy	2986
Melton, Herbert	2987
Melton, Sirene	2988
Melton, Pearl	2989
Barnett, Maud, née Melton	2990
Williams, Daniel	2993
Holt, Louisa	2994
Brown, Louis T	2999
Hill, Ella, née Brown	3000
Campbell, Joe	3004
Laslie, Charlotte	3005
Shaw, Abe	3006
Shaw, Albert	3007
Shaw, Georgie	3008
Shaw, Verzie	3009
Shaw, Anderson	3010
Shaw, Emanuel	3011
Shaw, Tenny	3012
Robinson, William	3013
Robinson, Nicey	3014
Robinson, Eva	3015
Robinson, Jim	3016
Robinson, Jeannette	3017
Robinson, Charles	3018
Robinson, Amanda	3019
Robinson, John	3020
Robinson, Olive	3021
Robinson, Josie	3022
Robinson, Tobe	3023
Robinson, James	3024
Robinson, Martha	3025
Robinson, Melvina	3026
Robinson, Josephine	3027
Sutton, Sallie	3029
Ratcliff, Delilah	3032
Kennard, Polly	3033
Kennard, Dave	3034
Kennard, Delilah	3035
Cunningham, Susie	3036
Cunningham, Ben	3037
Wright, Edward	3038

List of freedmen whose names appear on the Kern-Clifton roll, etc.—Continued.

Name.	Kern-Clifton No.
Wright, John	3039
Holt, Esther	3040
McNair, Jane	3041
McNair, Dave	3042
McNair, Johnson	3045
McNair, Elmore	3046
McNair, Betty, née McIntosh	3048
McNair, Charles	3049
Rider, Andy	3050
Still, Plina	3051
Still, Etta	3052
Lynch, Joseph	3053
Lynch, Will	3054
Lynch, Geo. Washington	3056
Lynch, Rosetta	3057
Lynch, George	3058
Lynch, Eliza	3059
Freeman, John	3060
Freeman, Osa	3061
Freeman, John	3062
Freeman, Elnora	3063
Freeman, Charles	3064
Freeman, Jesse	3065
Freeman, Walter	3066
Freeman, Mary	3067
Freeman, George	3068
Freeman, Eliza	3069
Mayfield, Maggie	3070
Thompson, Cornelia	3071
Todd, Will	3072
Todd, Henrietta	3073
Todd, Louisa	3074
Landrum, Sam	3075
Landrum, Rachel	3076
Landrum, Jane	3077
Landrum, Albert	3078
Landrum, Mamie	3079
Daniels, Henry	3080
Chaggett, James	3090
Chaggett, Emalin	3091
Vann, Jesse	3092
Eaton, Nettie	3099
Duncan, Pomp	3100
Meigs, Florence	3107
Lane, Nelson	3108
Ward, Peter	3116
Ward, Abraham	3117
Ward, Alonzo	3118
Ward, Will	3119
Ward, Eliza	3120
Ward, Berry	3121
Ward, Dan	3122
Ward, Linney	3123
Ward, Artus	3124
Ward, Savannah	3125
Ward, Ernest	3129
Ward, Ben	3130
Ward, Daisy or Bessie	3132
Ward, Squire	3137
Ward, Sadie	3138
Ward, Joe	3139
Ward, Jennie	3140
Ward, Eliza	3141
Ward, Alex	3142
Ward, Henrietta	3143
Ward, Irvin	3144
Ward, Harry	3145
Ward, Roy	3146
Ward, Dan	3147
Ward, Troy	3148
Ward, Eliza	3149
Ward, George	3150
Ward, Dave	3151
Whitmire, James	3152
Whitmire, Davenport	3153
Brown, Isabel	3159
Brown, Richard	3160
Brown, George	3161
Brown, Warne or Warren	3162
Brown, Cinda	3163
Brown, Dora	3164
Brown, Key	3165
Martin, Rachel	3166
Martin, Will	3167
Martin, Harvey	3168
Martin, Arthur	3169
Martin, Nelson	3170
Martin, Rachel	3171
Martin, Jerry	3173
Martin, Harvey	3174
23: Martin, Jordan	3175
Bean, Fairby	3176
Martin, Luther	3177
Cushenberry, Leah	3179
Meigs, George	3189
Meigs, John	3190
Meigs, Flemen	3191
Meigs, Arena	3192
Meigs, Georgia	3193
Meigs, Luella	3194
Vann, Billie	3195
Webber, Harriet	3196
Webber, West	3197
Webber, Ed	3198
Webber, Millie	3199
Still, Eliza	3200
Still, Caldonia	3201
Norwood, Mary	3202
Norwood, Arthur	3203
Norwood, Eliza	3204
Martin, Mattie	3205
Martin, Luther	3206
Ross, Louisa	3207
Rogers, Sarah	3208
Rogers, Irene	3209
Rogers, Levy	3210
Rogers, Ham	3211
Rogers, Ella	3212
Rogers, Will	3213
Rogers, Miner	3214
Rogers, Billie	3215
McCormick, Betsy, née Rogers	3216
McCormick, Helen	3217
McCormick, Roberta	3218
McCormick, Hattie	3219
McCormick, Clara	3220
McCormick, Henry	3221
Johnson, Ann	3222
Johnson, Dollie	3223
Johnson, Laura	3224
Johnson, Elmira	3225
Johnson, Judia	3226
Johnson, Bertha	3227
Bean, Rachel	3230
Daniels, Harriet	3234
Ward, Berthena	3235
Ward, Isabella	3236
Ward, Emanuel	3237
Rogers, Deliah	3240
Rowe, Jeff	3244
Rowe, Grant	3245
Rowe, Viola	3247
Rowe, Leola	3248
Kirk, Emery	3249
Kirk, Evaline	3250
Anderson, Frances	3251
Morgan, John	3252
Morgan, Cynthia	3253
Thompson, Daniel	3256
Thompson, Patience	3257
Thompson, Andrew	3258
Thompson, Sandy	3259
Thompson, Mandy	3260
Latty, Joe	3261
Hildebrand, Liddy	3262
Glass, Mary	3269
Drew, George	3271
McClure, Will	3273
Ross, Hannah	3274
Ore, Jesse	3277
Thompson, Maud	3279
Vann, Mose	3284

List of freedmen whose names appear on the Kern-Clifton roll, etc.—Continued.

Name.	Kern-Clifton No.
Johnson, Cynthia	3285
Wilson, Oliver	3286
Wilson, Jacob	3287
Cross, Jennie	3288
Cross, Gertie	3289
Cross, Arthur	3290
Cross, Maud	3291
Cross, Lulu	3292
Cross, Ozella	3293
Brady, Robert	3294
Nero, Winnie	3295
Nero, Mollie	3296
Nero, Richard	3297
Nero, A. L	3298
Musrat, Bob	3299
Musrat, Eliza	3300
Musrat, Kiza	3301
Musrat, Eugene	3302
Musrat, Candy	3303
Musrat, Elijah	3304
Musrat, Smith	3305
Musrat, Lucy	3306
Martin, Sarah	3307
Moore, Winnie	3312
Moore, Melia	3313
Moore, Maggie	3314
Moore, Andrew	3315
Moore, Joe	3316
Moore, Bob	3317
McAwee, Emma	3319
McAwee, Ella	3320
McAwee, Evaline	3321
McAwee, James	3322
Vann, Isaac	3323
Hill, John	3325
Hill, Hannah	3327
Rogers, Mary	3328
Rogers, Louis	3329
Arnold, Eliza	3330
Arnold, Nancy	3331
Gross, Laura	3332
Gross, Lee	3333
Gross, Mary	3334
Gross, Kay	3335
Gross, Sallie	3336
Neal, Emma	3337
Neal, Ora	3338
Neal, Joanna	3339
Gross, William	3340
Howard, Adaline	3341
Thomas, Henry	3342
Chouteau, Jim	3345
Carter, Sallie	3348
Carter, Ernest	3349
Carter, Maurice	3350
Carter, Trudie	3351
McCoy, Sina	3352
McCoy, Leah	3353
McCoy, Sallie	3354
McCoy, Montgomery	3355
McCoy, Daisy	3356
McCoy, Clara	3357
McCoy, Henry	3358
McCoy, Aleck	3359
McCoy, Sam	3360
McCoy, Winnie	3361
McCoy, Sophronia	3362
McCoy, Felix	3363
McCoy, Manuel	3364
McCoy, Georgie	3365
McCoy, Genevieve	3366
McCoy, Annie	3367
McCoy, Andrew	3368
McCoy, Visa	3369
McCoy, Joe	3370
McCoy, Louis	3371
McCoy, Arthur	3372
McCoy, Jeffrey	3373
McCoy, Jeannette	3374
McCoy, Fannie	3375
McCoy, Matilda	3376
Haynes, Martha	3377
Haynes, Allen	3378
233 Lowery, Fannie	3380
Lowery, Emily	3381
Lowery, Hannah	3382
Lowery, Eliza	3383
Washington, George	3385
Washington, Jordan	3386
Martin, Arter	3393
Martin, Charles	3394
Martin, Linsa	3395
Martin, Guy	3396
Martin, Fred	3397
Martin, Eliza	3398
Martin, Arter	3399
Martin, Willis	3400
Martin, Annie	3401
Steel, Fannie	3402
Steel, Mourning	3403
Steel, Claude	3404
Steel, Roxey	3405
Steel, Mary	3406
Steel, Joe	3407
Steel, Willie	3408
Steel, Myrtle	3409
Riley, Samuel	3410
Beck, Sabrie	3414
Mays, Josiah	3418
Martin, Charles	3419
Martin, Pearl	3420
Martin, Ellen	3421
Martin, Edna	3422
Martin, Jim	3423
Martin, Joe	3424
Martin, Jennie	3425
Martin, Mary	3426
Johnson, Harrison	3427
Chambers, Celia	3432
Ball, Abbie	3433
Adair, Ben	3434
Brown, Josie, née Adair	3436
Brown, Turner	3437
Rowe, Abbie	3438
Rowe, Arthur	3439
Adair, Peter	3440
Adair, Aleck	3441
Adair, Goldy	3442
Adair, Elsie	3443
Adair, Abbie	3444
Adair, Mewnine	3445
Smith, Mose	3447
Smith, Jackson	3448
Smith, Tom	3449
Smith, Sallie	3450
Smith, Sol	3451
Smith, Elsie	3452
Smith, Nodilee	4353
Smith, Cicero	3454
Smith, Charles	3455
Smith, Susanna	3456
Smith, Bessie	3457
Smith, Joe	3458
Smith, Ross	3459
Smith, Leanna	3460
Smith, Isaac	3461
Smith, Laura	3462
Smith, Lovely	3463
Smith, Elmer	3464
Wolff, Pina	3465
Smith, Nancy	3466
Webber, Rebecca	3467
Curry, Berthie	3468
Curry, Nellie	3469
Curry, Elias	3471
Webber, Rebecca, jr	3471
Webber, Lou	3472
Webber, Arthur	3473
Johnson, Frank	3474
Webber, Ellis	3475
Holt, Eva	3476
Holt, George	3478

List of freedmen whose names appear on the Kern-Clifton roll, etc.—Continued.

Name.	Kern-Clifton No.
Rowe, Joe	3479
Rowe, Ann	3480
Nivens, Santa Ann	3481
Nivens, Eliza	3482
Nivens, Rose	3483
Fields, Jackson	3484
Fields, Jim	3485
Fields, Eliza	3486
Fields, Hester	3487
Fields, Sysille	3488
Starr, Jack	3489
Webber, Delilah	3490
Starr, Elijah	3491
Starr, Charles	3492
Grimmett, Peg, née Starr	3493
Starr, Lizzie	3494
Starr, Ed	3495
Jones, Mattie	3496
Jones, Fellah	3497
Johnson, Ruben	3498
Thornton, Katie	3509
Thornton, Joe	3510
Thornton, Eliza	3511
Thornton, Millie	3512
Thornton, Emma	3513
McNair, Ruth	3514
Kirls, Maggie, née Thornton	3515
Riley, Lottie	3516
Hildebrand	3517
Webber, Beckie	3518
Webber, Liddy	3519
Webber, Louis	3520
Webber, Louis, jr	3521
Webber, Dora	3522
Webber, Floyd	[illegible]
Towers, Wilson	[illegible]
Towers, Annie	[illegible]
Martin, Sy	3525
Towers, Edward	3526
Towers, Lucinda	3527
Towers, Richard	3528
Martin, Tobe	3529
Martin, Bessie	3530
Martin, Charles	3531
Bryant, George	3533
Martin, Tobe	3534
Looney, Stephen	3535
Looney, Peggy	3536
Looney, Allen, or Alfred	3537
Ross, Dave	3538
Ross, Dave	3539
Ross, Rufus	3540
Ross, Della	3541
Ross, Effa	3542
Ross, Nellie	3543
Ross, Hattie	3544
Ross, Chaney	3545
Willis, Emma	3546
Willis, Maggie	3547
Willis, Lord	3548
Willis, Steve	3549
Looney, Jake	3550
Looney, Frank	3551
Looney, Alice	3552
Looney, Bertie	3553
Looney, Clarence	3554
Looney, Coral	3555
Looney, Will	3556
Willis, Justin	3557
Williams, Elnora	3558
Williams, Jimmie	3559
Ward, Catharine	3560
Whitmire, Samuel	3561
Whitmire, Sam	3562
Whitmire, Phillis	3563
234 Alberty, James	3567
Alberty, Daisy	3568
Alberty, Cora	3569
Alberty, Aleck	3570
Alberty, Jim, jr	3571
Alberty, Joanna	3572
	3573

Name.	Kern-Clifton No.
Alberty, Millie	3574
Holt, Jane	3575
Holt, Laura	3576
Holt, Ella	3577
Holt, Jesse	3578
Holt, Willard	3579
Johnson, Mary	3580
Holt, Chinnett	3581
Waite, Andrew T	3582
Waite, Mary	3583
Waite, Rufus	3584
Waite, Maggie	3585
Waite, Luella	3586
Waite, Joe	3587
Waite, Cora	3588
Waite, Hannah	3589
McLean, Joe	3590
Vann, Eddie	3591
Ross, Sarah	3592
Ross, Joe	3593
Ross, Harry	3594
Ross, Herbert	3595
Ross, Vernie	3596
Shad, Maud	3597
Shad, John	3598
Looney, Ervin	3599
Ross, Louis	3600
Ross, David	3601
Archie, Rose	3602
Archie, Thomas	3604
Archie, Will	3605
Archie, Ely	3606
Harris, Hattie	3607
Harris, Laura	3608
Harris, Sylvia	3609
Harris, Ella	3610
Harris, Phoenix	3611
Harris, Coody	3612
Griffin, George	3613
Manley, Joseph	3614
Whitmire, Susie	3615
Rose, Emily	3616
Rose, Will	3617
Rose, Mary	3618
Rose, Robert	3619
Rose, Geneva	3620
Rose, Jim	3621
Rose, Jess	3622
Rose, Charlie	3623
Freeman, Carrie, née Rose	3624
Smith, Pearl	3625
Smith, Elnora	3626
Smith, Jane	3627
Smith, Cora	3628
Smith, Matilda	3629
Smith, Chester	3630
Smith, Frank	3631
Smith, Bertha	3632
Smith, Catherine	3633
Smith, Levada	3634
Colbert, James	3635
Colbert, Myrtle	3636
Colbert, Mable	3637
Colbert, Minnie	3638
Holt, Josh	3639
Holt, Laura	3640
Holt, Ella	3641
Holt, Jessie	3642
Holt, Willard	3643
Graves, Ed	3648
Melton, Washington	3655
Melton, Mary	3656
Rider, Oscar	3666
Johnson, Walker	3668
Bean, Clarinda	3669
Taylor, John	3675
Whitmire, Elias	3676
Whitmire, Gracie	3677
Ross, Bill	3682
Ross, Vina	3683
Ross, Will	3684

List of freedmen whose names appear on the Kern-Clifton roll, etc.—Continued.

Name.	Kern-Clifton No.
Ross, Ben	3685
Ross, Tom	3686
Ross, Ellis	3687
McAnair, Louis	3690
McAnair, Floyd	3691
McAnair, Willie	3692
McAnair, Cooie	3693
McAnair, John	3694
McAnair, Eva	3695
McAnair, Ethel	3696
McAnair, Mackey	3697
Shields, Emma	3698
Shields, Ettie	3699
Shields, George	3700
Bell, Mary	3701
Bell, George	3702
Bell, Will	3703
Bell, Leslie	3704
Carter, John	3708
Carter, Jerry	3709
Nicholson, Fannie	3710
Nicholson, Ethel	3711
Nicholson, Edna	3712
Nicholson, Bessie	3713
Alberty, Robert	3718
Riley, Hannah	3728
Duncan, Joseph	3736
Duncan, George	3737
Duncan, Elizabeth	3738
Duncan, Emma	3739
Duncan, Clate	3740
Duncan, Harry	3741
Duncan, Jewell	3742
Duncan, Birt	3743
Duncan, Lawson	3744
Shields, Sophie	3745
Shields, Blanche	3746
Shields, Grace	3747
Manley, Alonzo	3748
Manley, Eddie	3749
Manley, Alonzo, jr	3750
Manley, Harvey	3751
Manley Fred	3752
Manley, Maynard	3753
Ross, Kizzie	3757
Ross, George	3758
Ross, Martha	3759
Ross, Nelson	3760
Ross, Harry	3761
Ross, Mary	3762
Ross, Arthur	3763
Ross, Nancy	3764
Ross, Emma	3765
Ross, Bert	3766
Ross, Louis	3767
Ross, George	3768
Ross, Minnie	3769
Ross, Lou	3770
Manley, Fred	3771
Manley, Proncell	3772
Taylor, Minnie	3774
Taylor, Poston	3775
Taylor, Prince	3776
Montgomery, Julia	3777
Montgomery, Abbie	3778
Montgomery, Mary	3779
Montgomery, Eva	1780
235 Montgomery, Ethel	3781
Montgomery, Cretell	3782
Montgomery, Ruth	3783
Tipps, Nancy	3784
Landrum, James	3785
Landrum, Ed	3786
Landrum, Frances	3787
Landrum, Lizzie	3788
Landrum, Jessie	3789
Landrum, Hattie	3790
Landrum, John	3791
Landrum, James	3792
Landrum, Emma	3793
Landrum, Nelson	3794
Landrum, Margaret	3795
Daniels, Durwood	3797
Daniels, Frank	3800
Whitmire, Jess	3802
Johnson, John	3805
Landrum, Nick	3807
Landrum Ella	3808
Harris, George	3809
Landrum, Otie	3812
Landrum, Rington	3813
Landrum, Frog	3814
Hicks, Jessie	3817
Hicks, Jessie	3818
Hicks, Matilda	3819
Hicks, Tennie	3820
Lee, Annie	3822
Brady, John	3823
Alberty, Caroline	3824
Hayes, Elmira	3625
Hayes, Ely	3826
Hayes, Rosa	3827
Smith, Jim	3828
Shepherd, Sam	3829
Hester, Catherine	3831
Hester, Lelia	3832
Hester, Fleta	3833
Hester, Hattie	3834
Hester, John	3835
Hester, Pearl	3836
Hester, Marvan	3837
Sanders, John	3845
Nave, Maria	3846
Vann, Jess	3854
Pee, John	3855
Vann, Martha	3856
Vann, William	3859
Vann, George	3861
Ridge, Katie	3863
Ridge, Elnora	3864
Ridge, Cornelius	3865
Melton, Phoebe	3866
Gaskin, Walter	3872
Ridge, Henry	3877
Ridge, Amanda	3878
Ridge, Pearl	3880
Ridge, Jesse	3881
Ridge, Myrtle	3882
Reese, John	3883
Grimmett, Emily	3884
Grimmett, Charles	3885
Grimmett, Sebron	3886
Grimmett, Emma	3887
Grimmett, Hannah	3888
Grimmett, Fred	3889
Grimmett, Flora	3890
Grimmett, Bertha	3891
Grimmett, Lottie	3892
Grimmett, Pet	3893
Grimmett, Emma	3894
Grimmett, Callie	3895
Grimmett, Ida	3896
Blye, Abbie	3897
Blye, Nancy	3898
Blye, Minnie	3899
Blye, Callus	3900
Blye, Annie	3901
Blye, Dallas	3902
Blye, Edward	3903
Blye, Mary	3904
Campbell, Omie	3905
Campbell, Lottie	3906
Campbell, Susie	3907
Campbell, Elizabeth	3908
Campbell, Masiline	3909
Campbell, Nathan	3910
Ramsey, Lydia	3911
Ramsey, Hettie	3912
Ramsey, Maria	3913
Ramsey, Jimmie	3914
Ramsey, Bennie	3915

List of freedmen whose names appear on the Kern-Clifton roll, etc.—Continued.

Name.	Kern-Clifton No.	Name.	Kern-Clifton No.
Martin, Louis	3916	Little, Virginia	4058
Martin, Alling	3917	Little, Will	4059
Martin, Ernest	3918	Little, Jim	4060
Martin, John	3919	Little, Sam	4061
Martin, George	3920	Little, John	4062
Martin, Fred	3921	Little, Amanda	4063
Bean, Caroline	3923	Riley, Joseph	4065
Adams, Ben	3925	Riley, Fred	4067
Lynch, Daniel	3927	Grimmett, William	4078
Albert, Mattie	3934	Grimmett, Edgar	4079
Albert, Lillie	3935	Grimmett, Eddie	4080
Albert, Elijah	3936	Grimmett, Henry	4081
Albert, Ida	3937	Grimmett, Malisa	4082
Albert, Jerry	3938	Grimmett, George	4083
Albert, Henry	3939	Vann, Arlena	4084
McLean, Malinda	3940	Martin, Lee	4085
McLean, Samuel	3941	Martin, Eddie	4086
McLean, Ella	3942	Martin, Estell	4087
McLean, Christian	3943	Martin, Ida	4088
McLean, Charley	3944	Lynch, Mattie	4090
McLean, Paralie	3945	Webber, Linda	4093
Barkum, Nancy, née Albert	3946	Rogers, Nettie	4094
Barkum, Annie	3947	Adams, Addie	4096
Barkum, Walter	3948	Adams, Lizzie	4097
Vann, George W	3949	Durant, Peggie	4105
Vann, James	3950	Durant, Leroy	4106
Morry, Aita	3951	Durant, Ed	4107
Morry, Mary Jane	3952	Durant, Rosa	4108
Vann, Newton	3953	Shobe, Viola	4109
Vann, Mary Jane	3954	Melton, Mary, duplicate of No. 3655	4110
Hill, Cornelia	3955	Melton, Wash, duplicate of No. 3656	4111
Hill, Annie	3956	Powell, Emma	4113
Hill, Pearlie	3957	Alberty, Will	4114
Youngblood	3958	Alberty, Sarah	4115
Youngblood	3959	Alberty, Anetta	4116
Taylor, Joann	3960	Bell, Hattie	4117
Mason, Parley	3961	Ross, Gertie	4118
Davis, Robert	3962	Powell, Lula	4119
Vann, Napoleon	3963	Ross, Guster	4120
Vann, Mary	3964	Powell, Mamie	4121
Howard, Ben	3965	Powell, Jess	4122
Vann, Bennie	3967	Robinson, Fred	4123
Nash, Isaac	3971	Alberty, Frank	4124
Nash, Arthur	3978	Webber, Lou	4125
Martin, Henry	3987	Webber, Walter	4126
Grooms, Eliza	3995	Webber, John	4127
Harper, William	4002	Webber, Tom	4128
Harper, Jim	4003	Webber, Joe	4129
Coody, Katie	4013	Webber, Lula	4130
Waite, Mary Ann	4014	Webber, Emma	4132
Hazelridge, Mary	4015	Webber, Willie	4133
Hazelridge, William	4016	Ross, Joe	4134
Hazelridge, Mary	4017	Phillips, Martha	4135
Hazelridge, Jessie, or Jess	4018	Phillips, Bessie	4136
Hazelridge, Lacey	4019	Phillips, Charles	4137
Hazelridge, Alex	4020	Phillips, Alice	4138
Hazelridge, Joe	4021	Phillips, Will	4139
Hazelridge, J. Milton Turner	4022	Phillips, Ben	4140
Gunter, Harry	4023	Walker, Charles	4141
Gunter, Henrietta	4024	Bean, Jake	4142
236 Gunter, Maggie	4025	Bean, Bertha	4143
Gunter, Louis	4026	Martin, Neatie	4144
Gunter, Birdie	4027	Martin, Houston	4145
Gunter, Mitchell	4028	Martin, Sallie	4146
Gunter, Rachel	4029	Martin, Tobe	4147
Gunter, Phillis	4030	Martin, Fred	4148
Holt, Bettie	4035	Martin, George	4149
Johnson, Nettie	4036	Martin, Louis	4150
Johnson, Kate	4037	Tucker, Ellen or Ella	4152
Johnson, Clarence	4038	Whitmire, Lucinda	4154
Johnson, Francis, or Holt	4039	Foster, William	4159
Davis, Archie	4040	Banks, Lettie	4167
Davis, Elizabeth	4041	Banks, Willie	4168
Davis, Ida	4042	Banks, Irene	4169
Davis, Madora	4043	Ross, Jacob	4170
Davis, Clara	4044	Ross, Maria	4171
Davis, Vinita	4045	Ross, Ella	4172
Davis, Julia	4046	Ross, Emma	4173
Landrum, Polly	4047	Ross, George	4174
Little, Aggie	4057	Ross, Mose	4175
		Tucker, Sarah, née Ross	4176

List of freedmen whose names appear on the Kern-Clifton roll, etc.—Continued.

	Name.	Kern-Clifton No.
	Tucker, Oscar	4177
	Ross, Willie	4179
	Murrell, Nelson	4184
	Murrell, Henry	4185
	Murrell, Charles	4186
	Murrell, John	4187
	Murrell, Jesse	4188
	Murrell, Willie	4189
	Murrell, Nola	4190
	Martin, David	4191
	Martin, Lurena, née Peterson	4192
	Martin, Charity	4193
	Martin, Fred	4194
	Martin, Mary	4195
	Martin, Josie	4196
	Martin, Will	4197
	Martin, Eliza	4198
	Vinton, Joe	4199
	Mays, Cynthia	4200
	Mays, Beatrice	4201
	Williams, Lizzie	4202
	Roach, Jess	4203
	Patterson, Annie	4204
	Thompson, Dan	4205
	Blackwell, Lucinda	4206
	Ross, Tom	4207
	Coody, Louis	4208
	Coody, Jack	4009
	Coody, Manda	4210
	Tinnon, Dicey	4211
	Tinnon, Louis	4212
	Tinnon, Lunnie	4213
	Tinnon, Gertie	4214
	Sorrell, Mattie	4215
	Sorrell, Morris	4216
	Sorrell, Richard	4217
	Sorrell, Vinita	4218
	West, Carrie	4219
	Thomas, Willie	4220
	West, Laura	4221
	Rider, Mary	4222
	Rider, Dora	4223
	Rider, Adline	4224
	Thompson, George	4225
	Thompson, Rhoda	4226
	Thompson, John	4227
	Thompson, Sallie	4228
	Thompson, Jess	4229
	Thompson, James	4230
	Thompson, George	4231
	Leak, Elizabeth	4232
	Lowery, Thomas	4233
	Hardrick, Mabel	4234
237	Childers, Paul	4235
	Childers, Noah	4236
	Childers, Jay	4237
	Childers, Samantha	4238
	Vann, Ibbie	4239
	Adams, Mattie	4240
	Sanders, John	4241
	Hayes, Phillis	4242
	Hayes, Louis	4243
	Hayes, Frank	4244
	Cash, Bettie	4246
	Cash, Gussie	4247
	Cash, Will	4248
	Cash, Oce	4249
	Cash, John	4250
	Cash, Ethel	4251
	Cash, Hester	4252
	Brewer, Sam	4253
	Looney, Boson	4254
	Looney, Jane	4255
	Wright, Francis	4256
	Looney, Henry	4257
	Allen, Ellen	4258
	Looney, John	4259
	Looney, Rosetta	4260
	Whitmire, Lucinda	4261
	Whitmire, Alice	4262
	Whitmire, Henry	4263
	Looney, George	4264
	Beason, Essie	4265
	Beason, Bonnie	4266
	Sanders, Squire	4267
	Sanders, Will	4268
	Sanders, Cora	4269
	Sanders, Berry	4270
	Sanders, Rosella	4271
	Sanders, Fannie	4272
	Sanders, Fred	4273
	Sanders, Ike	4274
	Sanders, Sam	4275
	Pack, Kate	4276
	Pack, Will	4277
	Pack, Signore	4278
	Pack, Fannie	4279
	Pack, Tom	4280
	Pack, Howard	4281
	Pack, Albertha	4282
	Pack, Clarence	4283
	Pack, Sarah	4284
	Pack, Tom	4285
	Pack, Mary, now Meadows	4286
	Pack, Annie	4287
	Webber, Margaret	4288
	McNair or Riley, Maria	4290
	Johnson, Harry	4317
	Johnson, Callie	4318
	Allen, Millie	4336
	Hamilton, Andrew	4341
	Hare, Abraham	4342
	Ratcliff, Ellis	4343
	Ratcliff, Oscar	4344
	Ratcliff, Nathan	4345
	Ratcliff, Irwin	4346
	Seals, Mose	4349
	Fields, Catherine	4350
	Chouteau, Louis	4354
	Thornton, Grant	4358
	Ford, John	4360
	Ford, Dennis	4361
	Barker, Royal	4363
	Sanders Grove	4365
	Sanders, Lizzie	4366
	Smith, Clem	4367
	Landrum, Sophronia	4368
	Woodard, Hester	4372
	Mackey, Georgie	4374
	Mackey, Mattie	4375
	Thompson, Dollie	4376
	Thompson, Mary	4377
	Thompson, Liddy	4378
	Thompson, Lila	4379
	Thompson, Carrie	4380
	Lowery, Josh	4383
	Hall, Florence	4384
	Hall, Florence	4385
	Hall, Ned	4386
	Hall, Mary	4387
	Hall, Martha	4388
	Cucumber, Sallie	4391
	Jones, Anna	4399
	Hampton, Adeline	4402
	Kimbrough, Hannah	4404
	Kimbrough, Mary Ann	4405
	Buffington, Georgia	4406
	Buffington, Sillie	4407
	Buffington, Charles	4408
	Buffington, Lula May	4409
	Buffington, Flossie	4410
	Buffington, Annie	4411
	Buffington, Willie	4412
	Buffington, Robert	4413
	Buffington, Gracie	4414
	Buffington, William	4415
	Buffington, William H	4416
	Buffington, Rose	4417
	Buffington, Ruth	4418
	Buffington, John	4419
	Buffington, Bessie	4420
	Buffington, Roy	4421

List of freedmen whose names appear on the Kern-Clifton roll, etc.—Continued.

Name.	Kern-Clifton No.	Name.	Kern-Clifton No.
Buffington, Lewis	4422	Daniels, Ransom	4492
Buffington, Rector	4423	Daniels, Maggie	4493
Buffington, Solomon	4424	Daniels, Joseph	4494
Webber, Frank	4432	Daniels, Harry, jr	4495
Beck, Charlotte	4437	McNair, Cynthia	4496
Beck, George	4442	McNair, Mary	4497
Daniels, Andrew	4446	McNair, George	4498
Daniels, Willie	4447	McNair, Willie	4499
Daniels, Louis	4448	McNair, Rosella	4500
Daniels, Tom	4449	McNair, Alfred	4501
Daniels, Susie	4450	Bell, George	4502
Daniels, Essie	4451	Bell, July	4503
Daniels, Minnie	4452	Harris, Agnes	4504
Daniels, Burrell	4453	Harris, Billy	4505
Daniels, Burrell Henry	4454	Harris, Dave	4506
Daniels, Mack	4455	Harris, Charles	4507
Daniels, Lizzie	4456	Harris, Silas	4508
Daniels, Robert	4457	Harris, Mamie	4509
Newton, Mary	4458	Harris, Minnie	4510
Newton, Lizzie	4459	Harris, Isaac	4511
Daniels, Louis	4460	Tucker, George	4512
Daniels, Abraham	4461	Mays, Sarah	4513
Daniels, Tom	4462	Mays, Eva	4514
Bell, Tom	4463	Mays, Cora	4515
Bell, Tensie	4464	Mays, Jesse	4516
Bell, George C	4465	Mays, Homer	4517
Bell, Viola	4466	Mays, Lurena	4518
Bell, Effie	4467	Mays, Andrew	4519
Bell, Emily Jane	4468	Hill, Selnia	4520
Brown, Loretta	4469	Hill, Rebecca	4521
Bell, Nancy Ann	4470	Hill, John	4522
Lewis, Georgianna	4471	McPherson, Betsy	4523
Lewis, Tennessee	4472	Watson, Mary	4524
Williams, Benny	4473	Watson, Lee	4525
Williams, Matty	4474	Watson, May	4526
Bell, Arthur	4475	McLish, Lurena	4527
Moss, Sarah	4476	Tucker, John	4528
Moss, George	4477	Tucker, Johnnie	4529
Moss, Julia	4478	Tucker, Joseph	4530
Moss, Sanford	4479	Brown, Hannah	4531
Moss, Howard	4480	Brown, Myrtle	4532
Moss, Samantha	4481	Daniels, Jim	4533
Moss, Rutherford	4482	Daniels, Emaline	4534
Moss, Elmira	4483	Daniels, Nancy	4536
Moss, Dwight	4484	Sanders, Mary	4543
238 Duffin, Frances	4485	Vann, Sam	4544
Duffin, Geo. B	4486	Brown, Lula	4546
Duffin, Josh	4487	Rogers, Sam	4549
Duffin, Frank	4488	Rogers, Jim	4550
Keys, Eliza	4489	Alexander, Phillis	4551
Daniels, Harry	4490	Landrum, Alice	4553
Daniels, Margaret	4491		

List of freedmen whose names appear on the Kern-Clifton roll and who are not enrolled by the Commissioner to the Five Civilized Tribes, who died between May 3, 1894, and March 3, 1907, as shown by the records in the office of the Commissioner to the Five Civilized Tribes.

Name.	Kern-Clifton roll No.	Name.	Kern-Clifton roll No.
Alberty, Carrie	3	Bean, Maud	285
Anderson, Jane	38	Vann, Melgy	298
Rowe, Louis	82	Martin, Ralph	313
Rowe, Chaney	83	Weber, Davis	348
Vann, Sank or Sam	124	Bryan, Nancy	341
Vann, Albert	129	Whitmire, Walter	358
Lynch, Fredonia	136	Murrell, Sarah	361
Thompson, Ellen	140	Murrell, Daisy	362
Thompson, Hamay	141	Murrell, Susan	369
Thomas, Stella	144	Vann, Eli	373
Ross, Lizzie	146	Vann, Polly	374
Coody, Louis	214	Leek, Albert	398
Taylor, Mary	235	Williams, Arthur	418
Williams, Judy	270	Landrum, Sam	439
Foster, Cora	276	Hughes, Sarah	452

List of freedmen whose names appear on the Kern-Clifton roll, etc.—Continued.

Name.	Kern-Clifton roll No.
Landrum, Andy	464
Bean, Evy	479
Johnson, Rachel	533
Dennis, Amanda	550
Dennis, Clem	553
Adams, Cora	557
Landrum or Johnson, Sidney	583
Nave, Flora	574
Brown, Jesse	601
Brown, Mary	608
Brown, Lucinda	602
Grimmett, Cora	615
Grimmett, Lewis	618
Ward, William	629
Vann, Upton	634
Moore, John	695
Nave, Jordan	700
Nave, Rosella	701
Rogers, Nick	711
Martin, Elizabeth	716
Ratcliffe, Eliza	785
Rider, Lucy	787
Vann, Lamon	814
Woodward, James	820
Rogers, Lizzie	869
Wright, Louis	877
Anderson, Hannah	889
Vann, Jennie	893
Webber, Dug	908
Webber, Amanda	910
Stidman, Dolly	913
Lasley, Andy	937
Thornton, Nancy	951
Sheppard, Thomas	971
Beck, James	975
Grimmett, Lillie	984
239 Mackey, Amanda	1036
Austin, Louis	1039
Brewer, Andrew	1062
Brown, John	1076
Wilson, Isaac	1138
Parks, Mack	1171
Vann, Butler	1181
Ford, Carrie	1220
Sanders, Sarah	1223
Nave, Henry	1228
Mackaye, Crockett	1258
Sheppard, Wash	1263
Mayfield, Nellie	1269
Mackey, Jennie	1277
Brown, Joseph	1409
Vann, Solomon	1410
Vann, Rose	1448
Smith, Wash	1530
Smith, Ibby	1529
Ford, Julia	1555
Brown, Fanny	1586
Brown, Robert	1588
Drew, Henrietta	1616
Johnson, Frank	1598
Mackey, Kate	1626
Glass, Millie	1653
Schrimsher, Fred	1672
Mackey, Perry, jr	1682
Jones, Mary	1683
Brewer, Frances	1690
Vann, Lucinda	1701
Brewer, Jackson	1703
Crossland, Lulu	1731
Riley, Sol	1761
Riley, Lucinda	1762
Riley, Charles	1770
Drew, William	1796
Walker, Lizzie	1797
Fields, Mary	1808
Benge, Neg	1821
Wright, Maggie	1829
Crapo, Joanna	1875
Parris, Henry	1911
Ross, Laura	1956
Dydas, Rachel	1995
Fields, Simon	2006
Fields, Simon	2008
Johnson, Evan	2017
Warford, Melzie	2043
Johnson, Sidney	2045
Johnson, Johnson	2046
Carter, Dick	2084
Sheppard, Joel	2094
Smith, Joe	2124
Hicks, Phoebe	2129
Williams, David	2198
Lowrey, Chaney	2285
Parris, Amanda	2302
Martin, Wilson	2332
Depey, Toby	2356
Davis, Eliza	2406
Alberty, Josh	2433
Leak, Ed, sr	2445
Alberty, James	2449
Frog, Tobacco Will	2472
Foster, Rebecca	2500
Foster, Jennie	2502
Mayfield, John	2510
Meigs, Peter	2511
Beck, Dona	2515
Beck, Harvey	2516
Meigs, Simon	2519
Bowlen, Arelia	2575
Allen, George	2583
Rogers, Isaac	2587
Grayson, Louisa	2606
Grayson, Mary	2607
Grayson, George	2608
Grayson, Garfield	2609
Grayson, Lucy	2610
Markham, Addie	2612
Johnson, Israel	2643
Jenkins, George	2672
Mackey, Alice	2695
West, Ollie	2769
West, Sylvester	2774
Wilson, Irene	2795
Bryant, Ephraim	2812
Brown, Jeff	2819
Martin, Henry	2949
Martin, Rosa	2952
Shaw, Abe	3006
Sutton, Sallie	3029
Cunningham, Susie	3036
Lynch, George	3058
Thompson, Cornelia	3071
Ward, Henry	3126
Ward, Eliza	3149
Martin, Nelson	3170
Ross, Louisa	3207
Johnson, Bertha	3227
Bean, Rachel	3230
Rogers, Deliah	3240
Thompson, Patience	3257
Drew, George	3271
Thompson, Maud	3279
Musrat, Candy	3303
McAwee, James	3322
Arnold, Nancy	3331
McCoy, Montgomery	3355
McCoy, Clara	3357
McCoy, Manuel	3364
Martin, Mary	3426
Smith, Mose	3447
Smith, Sol	3451
Smith, Nodalee	3453
Smith, Susanna	3456
Rowe, Ann	3480
Jones, Mattie	3496
Johnson, Ruben	3498
Alberty, Millie	3574
Ross, Sarah	3592
Archie, Will	3605
Smith, Lavada	3634
Melton, Washington	3655
Rider, Oscar	3666

List of freedmen whose names appear on the Kern-Clifton roll, etc.—Continued.

Names.	Kern-Clifton roll No.	Names.	Kern-Clifton roll No.
Nicholson, Edna	3712	McNair, Mary	4467
Alberty, Robert	3718	Harris, Agnes	4504
Duncan, Joseph	3736	Tucker, Johnnie	4528
Shields, Sophie	3745	Murrell, Jessie	4188
Manley, Alonzo	3748	Murrell, Nola B	4190
Landrum, Hattie	3790	Duncan, Harry A	3741
Hicks, Jessie	3818	Webber, Frank	4432
Vann, Jess	3854	Polston, Wiley	2796
Vann, George	3861	Powell, Emma	4113
Bean, Caroline	3924	Ross, Jacob	4170
McLean, Faralie	3945	Smith, Cicero	3454
Vann, James	3950	Smith, Bessie	3457
Nash, Arthur	3978	Landrum, Charles	3048
Riley, Joseph	4065	Nivens, Santa Ann	3481
Durant, Peggie	4105	Kirk, Emory	3249
Melton, Wash	4111	Kirk, Evaline	3250
Webber, Walter	4126	Whitmire, Jesse	3802
Webber, Lou	4125	Moore, Joseph	3316
Webber, Emma	4132	Vann, William	577
Martin, Fred	4148	Johnson, Maude	2004
Tucker, Ellen	4152	Landrum, Martha	3856
Ross, Emma	4173	Grooms, Eliza	3995
Murrell, Charles	4186	Towers, Wilson	3524
Tinnon, Dicey	4211	Thornton, Katie	3509
Rider, Dora	4223	McLain, Malinda	3940
Thompson, James	4230	Hare, Abraham	4342
Vann, Ibby	4239	Whitmire, Lucinda	4154
Looney, Boson	4254	Hardrick, Malinda	2871
240 Sanders, Squire	4267	Grimmett, William	4078
Pack, Annie	4287	Williams, Lizzie	4202
McNair, or Riley, Maria	4290	Beck, George	4442
Allen, Millie	4336	Cash, Augustus	4247
Barker, Royal	4363	Chambers, Charles	589
Cucumber, Sallie	4391	Rogers, Sidney	901
Jones, Anna	4399	Thompson, Moses	1257
Kimbrough, Hannah	4404	Foreman, Luster	543
Daniels, Abraham	4461	Coody, Lydia	4169
Daniels, Harry	4490	Meigs, Elizabeth	2512

List of children born between May 3, 1894, and March 3, 1907, of those freedmen whose names appear upon the Kern-Clifton roll and do not appear upon the roll prepared by the Commissioner to the Five Civilized Tribes, as appears upon the records in the office of the Commissioner to the Five Civilized Tribes.

Ancestor.	K.-C. No.	Children.	Card No.
Rogers, Lewis	3329	Rogers, Sallie A	R 37
		Rogers, Alonzo	R 37
Lynch, Charles J	727	Lynch, Emily B	R 70
		Lynch, Amanda	R 70
Bell, Arthur	4475	Bell, Jesse	NB 437
Bell, George C	4465	Bell, Thomas	NB 495
		Bell, Booker T	NB 495
Brown, Emily Jane	4468	Brown, Jesse May	R 193
Buckner, Sarah E	2554	Buckner, Bessie	R 199
Huddleston, Ella	2557	Huddleston, Ora L	R 201
		Huddleston, Vernon G	NB 443
Johnson, Ann	3222	Johnson, Sherman	R 205
		Johnson, Bessie	R 205
Mayfield, Dollie	3223	Mayfield, Ollie Ann	R 206
Landrum, Sam	3075	Landrum, Nannie	R 223
		Landrum, Moody	R 223
		Landrum, Eva	R 223
		Landrum, Bessie	NB 242
		Landrum, Sammie	NB 242
		Landrum, Daniel	NB 242
Bryant, Eliza	2813	Bryant, Lewis	R 228
		Bryant, Charles	R 228
		Bryant, Homer	R 228
Shaw, Abe	3006	Shaw, Augustus	R 229
		Shaw, Wooster	R 229
Grooms, Eliza	3995	Grooms, Ennis	R 233
Childers, Paul	4235	Childers, Clarence	R 234

List of children born between May 3, 1894, and March 3, 1907, etc.—Continued.

Ancestor.	K.-C. No.	Children.	Card No.
Childers, Joy	4237	Looney, Elmer	R 23
Gunter, Lewis	4026	Gunter, Leone	NB 296
		Gunter, Margree	NB 296
Archie, Birdie	4027	Driver, Mahala	R 240
		Archie, Christina	R 240
Lynch, Joseph	3053	Lynch, Josie	R 242
Cross, Jennie	3288	Cross, Viola	R 253
		Cross, Kitty	R 253
Ford, Rhodie	2687	Ford, James	R 254
		Ford, Ethel	R 254
Colbert, Saphrony	3362	Colbert, Marie	R 255
		Colbert, Millie	R 255

241 *Reargument of case.*

On March 1, 1909, this case was argued by Mr. Charles Poe for the claimants and Mr. William W. Hastings for the defendants. On March 2, 1909, Mr. George M. Anderson was heard for the defendants, Mr. Samuel A. Putman replied, and the case was submitted.

Leave granted to proceed under supplemental petition.

On March 29, 1909, leave was granted to proceed under the supplementary petition. Form and extent of decree to be hereafter considered.

(See Journal of March 29, 1909.)

242 *Subsequent proceedings.*

On May 17, 1909, the defendants filed a motion for a rehearing to the order granting leave to proceed under the supplemental petition entered March 29, 1909.

On Nov. 15, 1909, this motion was argued by Mr. George M. Anderson, for the motion, and by Mr. Samuel A. Putman and Mr. Robert H. Kerns in opposition. On Nov. 16, 1909, Mr. William W. Hasting was heard in support of the motion and the motion was submitted.

On May 2, 1910, the defendants' motion for rehearing was overruled.

On May 31, 1910, the defendants filed a motion for a rehearing.

On October 19, 1910, the motion of May 31, 1910, was argued by Mr. George M. Anderson and Mr. William W. Hastings for the defendants, and by Mr. Samuel A. Putman in opposition thereto, and the motion was submitted.

On February 20, 1911, the defendants' motion for a rehearing was overruled. Court filed final decree for complainants, with an opinion by Howry, J., of which the following is a copy:

243 *Opinion of the court. Filed February 20, 1911.*

Court of Claims of the United States.

No. 17209.

(Decided February 20, 1911.)

MOSES WHITMIRE, TRUSTEE, v. THE UNITED STATES AND THE CHEROKEE NATION.

This is the same case reported in 30 C. Cls. R., 138; in 38 id., 180; and in 44 id., 453. By the first decision it was established that the Cherokee freedmen were Cherokee citizens, equally interested with Cherokees of the full blood in the common property of the nation and equally entitled to share in its future proceeds when distributed. By the second decision it was established that the recovery must be for a sum in gross, and that the amount recovered will constitute a fund for distribution; also that the Wallace roll made by the United States could be used as evidence of the number of the freedmen. By the third decision it was established that a court has power to inquire whether its judgment has been executed, and that inquiry here shows that the injunction placed on the United States and the Cherokee Nation by its decree has been violated. Because of the considerable number of persons claiming under the decree and of the delay of the executive officers in ousting persons from land while denying their right to be thereon, and because certain legislation subsequent to the decree has been interpreted by other courts adversely to the authority of the judiciary to interpose in such cases, this court now reexamines the legislation of Congress and the proceedings of this and the Supreme Court, ab initio.

I. The jurisdictional act, 1st October, 1890 (26 Stat. L., p. 636), had two purposes: To determine what were the rights of the freedmen in the common property of the Cherokee Nation; to enforce the distribution of such property as could then be distributed among those properly entitled thereto. The court, by its decree, accordingly enjoined the United States and the Cherokee Nation, as trustees, from making discriminations "in future distributions."

II. The right of the freedmen to participate in the proceeds of the Cherokee Outlet was brought before the court by amended petition and the decree extended to those funds.

III. The decree extended not only to previous payments made to the Cherokees, and payments about to be made, but also to the common property of the nation in which the freedmen might thereafter be entitled to participate. The decree did not fully perform its office until the last direction should be accomplished.

IV. The court took jurisdiction under the statute as a court of equity, the freedmen being considered wards with rights denied to them by their trustees.

V. The general rule is that the decree of a court of equity is not final so long as there remains anything to be done touching the parties or the subject matter.

VI. In rendering judgment under the jurisdictional act this court has the authority to inquire into the execution of its judgment; such authority is a part of the ordinary jurisdiction of a court.

VII. The jurisdictional act conferred authority not only to fix the rights of the parties but also to identify the individuals entitled to share per capita.

244 VIII. The distribution of the money derived from the sale of the Cherokee Outlet did not operate to prevent the court from reserving a right to continue its jurisdictional supervision; and the right to enforce its decree continued to exist without reservation expressed.

IX. The court did in fact continue its jurisdictional supervision. It did so without interfering with the discretion of the Secretary of the Interior or of the commission acting under him so long as no complaint was made that they were violating the terms of the decree.

X. Statutory jurisdiction continues so long as parties and subject matter remain, unless the authority which conferred jurisdiction takes it away. Here Congress has not interfered with jurisdiction of the court or with its decree.

XI. By the acts of 1898 and 1902 the Dawes Commission was required "to make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims."

XII. It must be taken as decided that the Kern-Clifton roll of distributees omitted all who had lost their citizenship prior to May 3, 1894. The act of 1st July, 1902, excluded those who had lost their citizenship after May 3, 1894, but before September 1, 1902. In all other respects the roll of distribution was to be in strict compliance with the decree of this court.

XIII. The refusal of the Dawes Commission to allow some of these persons to participate in the common property of the Cherokees, as provided by the decree, was not "strict compliance" therewith. But the court has yet the power to disregard the roll and direct a new roll to be made if proof be submitted which shall satisfy the court that the roll was fraudulent.

XIV. The provisions in the statute that the final roll of distribution be in strict compliance with the decree is more than an ordinary statutory provision; it enunciates the declaratory principle of the statute. Congress thereby declared that they would not legislatively undo what the judiciary had settled; and what they would not do themselves they would not allow another branch of the Government to do.

XV. The provisions in those acts which follow the declaratory principle are merely directory; they relate to the duties of officers and not to the rights of parties.

XVI. The Dawes Commission was not a judicial body. No party was sure of a hearing before it; its action was subject to the approval of an executive officer; its legislative object was not to ascertain rights, but to assist individuals to obtain rights already existing.

XVII. Where parties are rightfully entitled to judicial redress, a court should continue to exercise jurisdiction, if it has it, and should not interpose doubts and artificial refinements to save itself from the responsibility of decision.

XVIII. The original intent of Congress was that this court should determine all questions of property rights between the Cherokee Nation and the Cherokee freedmen. Congress have adhered to that intent, and any conclusion which will deprive claimants of judicial assistance will be contrary to the express intent of Congress.

XIX. The duties of the Secretary of the Interior under the statutes were ministerial—to make up a roll of distribution of a different date, but otherwise in strict compliance with the decree of the Court of Claims. The Dawes Commission was a subordinate agency to carry out the Secretary's ministerial work, and therefore could not be judicial.

XX. The act of 1898 confirmed the roll of 1880 as a basis for a new roll, except as to freedmen who had been wrongfully left off of the roll of 1880 by the Cherokee Nation. Therefore the intent of Congress was that the Dawes Commission should make another roll, which would comply with the decree of the court.

XXI. The Kern-Clifton roll was necessarily before the Dawes Commission subject to corrections for fraud or mistake in the matter of the identity of freedmen living on the 3d day of May, 1894, to which additions were to be made as of the 1st day of September, 1902. The statutory provisions leading to this result examined and set forth.

XXII. Presumptively the Kern-Clifton roll was correct for reasons stated. There doubtless were mistakes, but the jurisdictional act included jurisdiction to identify individuals entitled to share in adjudicated rights.

XXIII. When Congress rejected an amendment to the Curtis Act which would have opened the door to freedmen who had been found not to be entitled to citizenship, such rejection shows that it was not the purpose of Congress to take from the court jurisdiction.

245 XXIV. The amendatory decree of February 3, 1896, was to remove doubts. The language of the act of April 26, 1906, is almost precisely the same as that of the amendatory decree. Therefore the act practically reenacted the decree; it can not have been intended to supersede the directions of the court with respect to the manner in which the final roll should be made.

XXV. It is elementary that repeals by implication are not favored. Here there is no positive repugnancy between the act of 1906 and the previous statutes, and a statute can not be construed to have been intended to take away jurisdiction when it requires a commission to obey the terms of a court's decree.

XXVI. Where an amendment was offered, during the consideration of a bill, which would impair the jurisdiction of the court in the matter now under consideration, and was rejected, its rejection is indicative of the intent of Congress.

XXVII. The decisions of other courts holding that the jurisdiction of this court ended with its decree, and that exclusive jurisdiction was conferred upon the Dawes Commission to make the final roll for distribution, subject only to the supervision of the Secretary of the Interior, examined and explained.

XXVIII. The proposition that since Congress provided that the action of the Secretary of the Interior in approving the Dawes roll should be final, has been in effect overruled by the Supreme Court. Other cases cited, examined.

XXIX. A court having power to decree the payment of money from the Treasury necessarily has the power to carry out its decree. But this court is expressly invested with such powers as are necessary to carry into effect the powers granted to it by law. (Rev. Stat., 1070.)

XXX. Mandamus is a legal remedy to compel any person, corporation, public functionary, or tribunal to perform a duty required by law where there is no other legal remedy. But it is not a remedy under the conditions of this case.

XXXI. Where two jurisdictions have been created by Congress, for special purposes, one of them possessing judicial power in a constitutional sense, and the other not, persons whose rights are affected should have the benefit of a decree establishing their rights judicially. And, if there be a doubt, such persons should have the doubt resolved in their favor.

The reporters' statement of the case:

The facts of the case sufficiently appear in the opinion of the court.

OPINION.

HOWRY, J., delivered the opinion of the court:

Under the jurisdictional act set forth in the margin,[1] Whitmire, as trustee, filed his original petition in this case on the 26th day of September, 1891, in which he alleges that under the terms of the treaty of July 19, 1866, the freedmen and free colored persons of the Cherokee

[1] "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That full jurisdiction is hereby conferred upon the Court of Claims * * * to hear and determine the just rights in law or in equity of * * * the Cherokee freedmen, who are settled and located in the Cherokee Nation under the provisions and stipulations of article nine of the aforesaid treaty of eighteen hundred and sixty-six, in respect to the subject matter herein provided for."

By section 2 the subject matter was: "To recover from the Cherokee Nation all moneys due either in law or equity and unpaid to the * * * freedmen, which the Cherokee Nation have before paid out, or may hereafter pay, per capita, in the Cherokee Nation, and which was, or may be, refused to or neglected to be paid to the said * * * freedmen by the Cherokee Nation, out of any money or funds which have been, or may be, paid into the treasury of, or in any way have come or may come into the possession of the Cherokee Nation, Indian Territory, derived from the sale, leasing, or rent for grazing purposes on Cherokee lands, west of ninety-six degrees west longitude, and which have been, or may be, appropriated and directed to be paid out per capita by the acts passed by the Cherokee council, and for all moneys, lands, and rights which shall appear to be due to the said * * * freedmen under the provisions of the aforesaid articles of the treaty and articles of agreement." (26 Stat., 636.)

Nation are and have been entitled to participate in the common property of said nation as if they were Cherokees by blood, and that certain sums of money have been or are in the Treasury of the United States or the Cherokee Nation, and have been or are about to be paid to members of the Cherokee Nation, per capita, to the exclusion of said freedmen and free colored persons, and prays that said
246 freedmen and free colored persons may be found and decreed to be seized of and to have and enjoy proportionate rights, interests, titles, and shares in all the said common property of said nation as if they were Cherokees by blood, and that they may have judgment for their proportionate interest in such sums as have been or may be about to be paid to the members of the Cherokee Nation, per capita.

On the 3d day of May, 1893, he filed his amended petition alleging that by act approved March 4, 1893, 27 Stat. L., 640, the United States had bought from the Cherokee Nation that portion of its territory known as the "Cherokee Outlet," paying therefor the sum of $8,595,736, and praying for judgment securing to the said freedmen and free colored persons full participation in this fund also.

On the 8th day of May, 1895, this court passed a decree declaring that the freedmen who had been liberated by voluntary act of their former owners, or by law, and all free colored persons who resided in the Cherokee country at the commencement of the rebellion and who were residents therein at the date of said treaty, or who had returned thereto within six months of said last-mentioned date, and their descendants, were admitted into and became a part of the Cherokee Nation and entitled to equal rights and immunities and to participate in the Cherokee national funds and common property in the same manner and to the same extent as Cherokee citizens of Cherokee blood; and that, in the distribution of the proceeds and avails of the public domain or common property of the nation among the citizens thereof by distribution per capita at any time hereafter, the defendant, the Cherokee Nation, and the defendant, the United States, as trustee of the Cherokee Nation, be enjoined and prohibited from making any discrimination between the Cherokee citizens of Cherokee blood or parentage and Cherokee citizens who are or were freedmen who had been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the Cherokee country at the commencement of the rebellion, and were residents therein at the date of said treaty, or who returned thereto within six months thereafter, and their descendents, to the prejudice of the latter.

And it further appearing to the court that an enumeration of the aforesaid freedmen, free colored persons, and their descendants was made and approved under and by virtue of an act of Congress by the Secretary of the Interior of the United States, and that said census of the aforesaid freedmen and free colored persons and their descendants was known as the "Wallace roll," and that said Wallace roll contained the number of said persons as were in existence on the 4th of

March, 1883, and that the number of said persons shown thereby was 3,524; and that the defendant, the Cherokee Nation, did not participate in the preparation of said Wallace roll, but that ample opportunity was afforded it to do so; and that its refusal to do so is as effective as if it had actually taken part in the preparation of said Wallace roll, and it is concluded thereby. It was therefore adjudged and decreed that said Wallace roll, showing 3,524 of such persons, be approved by this court and taken by it as furnishing the true number of the freedmen, to wit, 3,524, as being the number of freedmen to be entitled, together with the other citizens of the Cherokee Nation, to be taken as a basis in estimating the amount of money to be decreed to be paid plaintiffs in this action.

247 Thereupon both the claimant and the defendant prayed an appeal to the Supreme Court. While these applications were pending they agreed between themselves upon a decree, and filed in this court a stipulation to mutually withdraw their applications for appeal upon the entry of their said decree.

This action was approved by this court, and on the 3d day of February, 1896, this court entered said decree nunc pro tunc as of May 8, 1895.

In this latter decree it was provided that the complainants in this suit and those whom they represent, being the freedmen and free colored persons aforesaid and their descendants living and in being on the 3d day of May, 1894, are entitled to participate hereafter in the common property of the Cherokee Nation in the same manner and to the same extent as Cherokee citizens of Cherokee blood or parentage may be entitled, and that in the distribution of the proceeds and avails of the public domain or common property of the nation among the citizens thereof by distribution per capita at any time hereafter, the defendant, the Cherokee Nation, and the defendant, the United States, as trustee of the Cherokee Nation, be enjoined and prohibited from making any discrimination between the Cherokee citizens of Cherokee blood or parentage and Cherokee citizens who are or were freedmen who had been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the Cherokee country at the commencement of the rebellion, and were residents therein at the date of said treaty, or who returned thereto within six months thereafter, and their descendants, to the prejudice of the latter; it being understood that the freedmen and their descendants and free colored persons above referred to shall include only such persons of said class as have not forfeited or abjured their citizenship of said Cherokee Nation at the date of entering of this decree.

And the Secretary of the Interior was authorized to appoint three commissioners, one on the nomination of the complainant and one on the nomination of the defendant, the Cherokee Nation, but both nominations to be approved by him, to proceed to the Cherokee country and hear the testimony both for and against the identity of all freedmen, free colored persons, and their descendants, claiming

to be entitled to share in the distribution of $903,365, that may be offered by the respective parties to this suit; and that each of said parties shall be entitled to be represented before said commissioners, either at the taking of testimony in the Cherokee country or elsewhere; and that the said commissioners in ascertaining the identity of the freedmen entitled to share under this decree shall accept what is known as the authenticated Cherokee roll, the same now being on file in the office of the Secretary of the Interior, having been furnished to him and purporting to have been taken by the Cherokee Nation in 1880, for the purpose of showing the number of freedmen then entitled to citizenship in the said nation under the terms of the treaty between the United States and the Cherokee Nation hereinbefore referred to, and their descendants; and the said commissioners shall ascertain who of said persons named on said roll were alive and what descendants of said persons were alive on May 3, 1894, and no evidence shall be accepted by said commission tending to disprove the citizenship of any of the persons whose names appear upon said roll.

248 On the 18th day of February, 1896, and in response to questions propounded by the Commissioner of Indian Affairs, this court decided that the clause in Article IX of the treaty with the Cherokee Nation, July 19, 1866, in these words, "And are now residents therein, or who may return within six months, and their descendants," were intended for the protection of the Cherokee Nation as a limitation upon the number of persons who might avail themselves of the provisions of the treaty, and consequently that they referred to both the freedmen and the free colored persons previously named in the article; that is to say, freedmen and the descendants of freedmen who did not return within six months are excluded from the benefits of the treaty and of the decree, and that this period of six months extends from the date of the promulgation of the treaty, August 11, 1866, and consequently did not expire until February 11, 1867.

On April 14, 1896, the claimant filed a motion in this court reciting that in many instances the former slaves of the Cherokee Nation during the rebellion were taken from that country by their owners, the Cherokees, to the far Southern States, and in some instances to Old Mexico. That at the conclusion of the war some of these slaves who had enlisted in the Union Army were disbanded at various points of the Union far away from the Cherokee country. That both of these classes of freedmen were left at these various points penniless and ignorant, but with no intention of abandoning their residence in the Cherokee country; that as soon as possible they returned to the Cherokee country, but some of them not within the six months' limitation specified in the treaty; that these people have resided there continuously since and been as good citizens as that country has. And asking that these people be included in the said roll directed to be made under the decree of this court. This motion was overruled on the 15th day of April, 1896.

On the 20th day of February, 1896, the Secretary of the Interior appointed commissioners to make a roll of the freedmen and free colored persons of the Cherokee Nation. These commissioners went to the Cherokee Nation and made up a roll of the individual freedmen and free colored persons of the said nation living and in being on the 3d day of May, 1894, who were entitled under the terms of the decree to citizenship in the nation and to share in the distribution in its common property. (An. Report of Int. Dept., 1897, pp. 71, 72.)

At the various sittings of the commissioners in the nation for the purpose of ascertaining the identity of the persons entitled to be placed on said roll the Cherokee Nation was represented by its attorney. The commissioners completed the roll, which was thereafter known as the Kern-Clifton roll, and it was approved by the Secretary of the Interior on the 18th day of January, 1897, and in the month of February, 1897, the moneys then available for distribution were paid to the persons so placed by said commissioners on said roll. No exception was at that time taken by any of the parties to this cause to the action of the commissioners or to the action of the Secretary of the Interior in making and approving said roll and in paying said moneys.

By section 21 of an act known as the Curtis Act, approved June 28, 1898, 30 Stats., 495, the Dawes Commission (theretofore created for more general purposes) was directed to take the roll of Cherokee citizens of 1880, not including freedmen, as a basis; but respecting the roll of freedmen that section provided that "it shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims entered the 3d day of February, 1896."

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By the act of July 1, 1902, 32 Stats., 716, Congress provided for the allotment of Cherokee lands to all Cherokee citizens living on September 1, 1902, and provided in sections 25 and 26 for the classes of persons to be enrolled and those who should not be enrolled. But by section 27 Congress also provided that "such rolls shall in all other respects be made in strict compliance with the provisions of section 21 of the act of Congress approved June 28, 1898." This referred to the freedmen.

The Dawes Commission proceeded to make up rolls, which were finally approved by the Secretary of the Interior March 4, 1907, but in so doing excluded from their rolls a large number of freedmen who had been enrolled under the decree of this court of February 3, 1896, supra.

At the time of the passage of the last act of the Cherokee Nation owned about 4,500,000 acres of land in the Indian Territory, and there was to the credit of the nation in the Treasury of the United States $2,900,000, to which fund large sums have since been added.

By the supplemental petition now being prosecuted it is made to appear that in the further distributions of moneys and in the allotments of lands now about to be made by the Secretary of the Interior petitioners are about to be excluded from participation therein in disregard not only of the acts of June 28, 1898, and July 1, 1902, ante,

but in violation of the decree of this court which prohibited the defendants as trustees from making any discrimination between Cherokee citizens of blood or parentage and Cherokee citizens who are or were freedmen. It is alleged that the directions of these statutes and of the decree have been disregarded in making rolls, which now have the effect to deprive petitioners of rights conferred by the decree under the treaty. The rolls which have this effect have been prepared from original testimony produced before the commission making these last rolls. The court finds that rolls of freedmen have been made including persons not on the court's roll and excluding persons on the court's roll.

Defendants say that petitioners whose names do not appear on the last-mentioned rolls had been permitted in many cases to make tentative allotment selections, so as to protect their homes and interests pending the final determination of their right to enrollment, but that these tentative allotment selections have been canceled and their right to enrollment denied. The specific defense made is "The probability that most, if not all, of the land held by freedmen claimants who have been rejected by the Secretary of the Interior has been allotted" to others.

But this means a mere tentative allotment; a mere paper designation.

Nevertheless, the Secretary of the Interior has not removed from these lands any freedmen claimants whose claim for citizenship was pending, nor has any action been taken to place other allottees in possession of land now being held by persons claiming freedmen citizenship whose enrollment has been denied.

250 It will thus be seen that there are some freedmen in possession of Cherokee lands whom defendants have not ousted, who are persons claiming under the ninth article of the treaty of 1866 whose rights apparently were fixed by the decree of February 3, 1906, and the action taken under that decree.

The objections to the action of the court relate to the jurisdiction to entertain the supplemental petition, and in not holding that the jurisdiction conferred by the act, 26 Statutes, 636 (under which the decree was rendered), had been exhausted upon the entry of the decree under the act.

The considerable number of people claiming and the necessities of many of them, who, it appears, live on the land claimed, together with the delay of the executive department of the Government in taking action (while denying the right of petitioners to the land, but meantime taking no steps to put them off) in connection with the presentation of certain alleged new matter affecting the rights of the parties, imposes a review of the issues, epecially as it is now argued that the legislation subsequent to the decre here has been interpreted by other courts against the right of the judiciary to interfere. These reasons and the very extensive interests involved seem to make necessary this opinion.

The act of October 1, 1890, 26 Stat., 636, which conferred the jurisdiction, had two purposes. Its first and main purpose was to determine what the rights of the freedmen in the common property of the Cherokee Nation were, and secondly, to enforce the distribution of such property as could then be distributed among those properly entitled. The court decreed that the freedmen and free colored persons, and their descendants living and in being May 3, 1894, were entitled to participate in the common property in the same manner as citizens of the blood. Then came the injunction directed to the trustees against making any discriminations against this class "in future distributions." The immediate distribution of money per capita derived from a sale of a part of the common land interest was subordinate to the larger question.

At the time of the original act conferring jurisdiction the United States had not made the purchase of what was known as the Cherokee Outlet. That purchase was after the filing of the original petition in this case. The purchase of the Cherokee Outlet from the Cherokee Nation was by an act approved March 4, 1893, 27 Stat., 640. By an amended petition the freedmen secured the early possession of their share in that fund. The decree extended to their claim in full as set forth in their original and amended petitions.

It is evident, then, that the original and amended petitions were filed with a double object: (1) To establish the rights of the freedmen as joint owners with all other citizens of the Cherokee Nation in and to the common property; (2) to secure the immediate payment to them of such portion of that fund as was then available.

The decree of the court recognized the double purpose of the statute providing (1) for payment to freedmen per capita of sums equal to the amount which they would have received if they had participated in previous payments to the members of the Cherokee Nation, and of sums which would make them participate equally in payments then about to be made; (2) in addition, that the freedmen be "entitled to participate hereafter in the common property
251 of the Cherokee Nation in the same manner and to the same extent as Cherokee citizens of Cherokee blood or parentage, and that in the distribution of the proceeds and avails of the public domain or common property of the nation * * * the United States as trustee of the Cherokee Nation be enjoined and prohibited from making any discrimination."

The decree did not perform its full office with the distribution of the particular fund, because in addition to providing for that distribution it also provided that these same distributees, "those living and in being on the third day of May, 1894," and of course their descendants, should thereafter participate in any division of the common property. The decree did not fully perform its office until this latter direction could be accomplished.

The jurisdictional act is broad, and the decree of the court under it is necessarily as broad as the statute. The court took jurisdiction as a court of equity. The freedmen were wards with rights thereto-

fore denied to them. It would now be anomalous to hold that the court can make no final decree for the protection of these parties. Refusal to do so would be tantamount to the court's refusal to take the full jurisdiction conferred upon it by the statute. The general rule is that the decree of a court of equity is not final so long as there remains anything to be done touching the parties or the subject matter of the controversy. The court took that view when it declared that "the court reserves the right to make all such further orders in aid hereof as to it may seem meet."

The subject matter to be included in any recovery embraced "all moneys due either in law or equity and unpaid to the * * * freedmen which the Cherokee Nation have before paid out, or money hereafter paid per capita in the Cherokee Nation, and which was, or may be, refused to or neglected to be paid to the * * * freedmen by the Cherokee Nation, * * * and for all moneys, lands, and rights which shall appear to be due to the said * * * freedmen under the provisions of the aforesaid articles of the treaty."

The Supreme Court held, in Pam-To-Pee v. United States (187 U. S., 382), that "the jurisdiction of a court is not exhausted by the mere entry of a judgment. It always has power to inquire whether that judgment has been executed." In rendering judgment under the act conferring this jurisdiction, the Court of Claims has the authority to inquire into the execution of its judgment, without which, according to the court of last resort, it would be shorn of a part of the ordinary jurisdiction of a court. Any judgment rendered under the jurisdictional act in this case was the subject matter of appeal where either party was dissatisfied.

The decree of February 3, 1896, resulted from a previous decree with which the parties to the litigation were dissatisfied. The final decree of February 3, 1896, was entered by the consent of all the parties involved. For that reason there was no appeal. But the issues had been actively litigated, and when the court undertook the duty of identifying the individuals entitled to share in everything that was to be allotted or distributed the defendants made no objections and acquiesced in the terms of the decree for the distribution of that part of the property then ready to be distributed. There was nothing in the terms of the decree or in the conduct of the parties affected
252 by it to raise the inference that its language did not apply to all future distributions of property, to which the complainants in that suit were entitled to have and enjoy whenever such property was ready for distribution.

As in Pam-To-Pee's case, supra, this court understood that the act conferring jurisdiction conferred authority not only to fix the rights of the parties, "but also to identify the individuals entitled to share therein." 187 U. S., 382, supra.

The decree went as far as it could at the time in carrying out both purposes of the act conferring jurisdiction. The secondary purpose was necessarily subordinate to the primary object and followed in course when it was determined that the freedmen possessed property

rights as Cherokee citizens. The distribution of the comparatively small sum of money derived from the sale of the Cherokee Outlet did not operate to prevent the court from reserving in specific language the right to continue its jurisdictional supervision, so that the freedmen might continue to obtain "from the Cherokee Nation the moneys due either in law or equity and unpaid to the * * * freedmen, which the Cherokee Nation have before paid out, or may hereafter pay, per capita, in the Cherokee Nation, and which was, or may be, refused to or neglected to be paid to the said * * * freedmen." That was the language of the decree. The right to enforce its decree continued to exist without reservation expressed; but it is not for a court which enters such a decree to make its terms and leave the parties declared entitled to redress without remedy after fixing rights which, with the entry of the decree, could only be partly satisfied.

Nearly a million dollars was distributed by virtue of the decree of 1896. Three times after the passage of the decree the court took steps to carry it out: (1) The court remitted to the Secretary of the Interior, as its agent, certain details with limitations relating to some objections of counsel. (2) The court construed this decree so as to make the limitations with regard to residence or return within six months apply to freedmen as well as free colored persons and fixed the date of the expiration of the six months as February 11, 1867, instead of January 19, 1867. (3) The court refused to include freedmen who for various reasons beyond their control had been unable to return within six months. Thus the court continued its jurisdictional supervision without interfering with the discretion of the Secretary of the Interior or of the commission so long as no complaint was made that he or the commission were violating the terms of the decree. It is apparent, then, that an extraordinary mistake was made in the distribution of the large sum of money then due as the result of the action of the commissioners who made up the Kern-Clifton roll, with the administrative approval of that roll by the Secretary of the Interior—the United States, as trustee, and the Cherokee Nation consenting and the court affirming—if now it shall be made to appear that these same distributees can not be heard to claim enrollment for distributions of money and allotments of land now ready to be made.

The general rule is that jurisdiction continues so long as there are parties and subject matter unless the authority conferring the jurisdiction has taken it away. Defendants contend that this has been done, and in support of this contention we are referred to Wallace v. Adams, 204 U. S., 415.

253 There a citizenship court had been established to determine who were citizens of the Choctaw Nation. The jurisdiction of that court was taken away by an act expressly abolishing the court. That was within the plenary power of Congress.

This case is essentially different. It nowhere appears that Congress has interfered with the jurisdiction here, or with the decree of this court, unless the act of 1890 (under which the decree of the court

was rendered in 1896) has been repealed by implication by subsequent legislative acts.

This brings us to a consideration of the jurisdiction of the court as affected by the acts of 1898 and 1902, supra.

We have seen that when the partition of the common property came to be made among the citizens of the Cherokee Nation per capita, which included the freedmen, the Dawes Commission was ordered "to make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the 3d day of February, 1896," section 21. This direction was supplemented by the act of July 1, 1902, which provided that "such rolls shall in all other respects be made in strict compliance with the provisions of section 21 of the act of Congress approved June 28, 1898 (30 Stat., 495) and the act of Congress approved May 31, 1900 (31 Stat., 221)," section 27.

The act of July 1, 1902, provided that only those be enrolled who were citizens on September 1, 1902. The Kern-Clifton roll, as directed by the decree of this court February 3, 1896, was to embrace those living and the descendants of those living as of May 3, 1894. We have said, and we again say, that it must be taken as adjudicated that the Kern-Clifton roll omitted all who had lost their citizenship prior to May 3, 1894. The act of July 1, 1902, was evidently intended to exclude those who had lost their citizenship after May 3, 1894, and before September 1, 1902, for in all other respects the roll was to be made in strict compliance with the decree of this court.

We are bound to presume that the Kern-Clifton roll was made in compliance with the decree, because the decree was entered by consent, and because the Cherokee Nation and the beneficiaries whose names appeared on that roll entered into an agreement for distribution to be made under it. As a matter of fact, distribution was made under it, and there is nothing to show that the Kern-Clifton roll was ever questioned until the supplemental petition had been filed herein. If the payment by the Secretary of the Interior was a "compliance" with the provision of the decree for the payment of money, the refusal of the Dawes Commission to allow these same persons to participate in the common property, as further provided in the decree, is not a "strict" compliance, nor, for that matter, a compliance of any kind.

The intent of Congress is plain that the decree of the court should not be ignored in all prospective or future distributions of communal property. But, of course, the court has yet the power to disregard the Kern-Clifton roll and direct an entirely new roll to be made if proof be submitted which shall satisfy the court that the Kern-Clifton roll was fraudulent. But we do not think that the court can be justified on the mere suggestion that the roll is fraudulent in disregarding the evidences presented by that roll of the citizenship of the parties as of May 3, 1894.

254 The first and chief and fundamental provision of the foregoing acts is the requirement that the future and final roll of Cherokee freedmen must be "in strict compliance with the decree of

the Court of Claims rendered February 3, 1896." These directions contain more than an ordinary statutory provision, because they embrace the declaratory principle of the acts.

In the passage of section 21 of the Curtis Act and section 27 of the act of July 1, 1902, supra, Congress have said in effect: At last some of the vexed questions of Indian rights have been settled judicially, and it is our legislative will that they shall remain settled. We have not lessened or changed or interfered with the judicial ascertainment of the rights of these parties, and what we have not done ourselves we will not empower another branch of the Government to do. Thereupon it is the congressional will that the administrative officers who will have these matters in charge in future proceedings must act in ascertaining who are entitled " in strict compliance with the decree of the Court of Claims rendered February 3, 1896," as a basis to carry out its work for a later date.

The provisions of these two acts of Congress which follow the specific direction relating to freedmen are merely directory; that is, they relate to the duties of officers and not to the rights of parties. There is no legislative intent apparent to take away the judicial ascertainment of legal rights of the parties and submit them to the future ex parte action of administrative officers. These provisions must be kept subordinate to the chief purpose of the statute and interpreted " in strict compliance " with the preceding section and " with the decree of the Court of Claims." The Dawes Commission was not a judicial body. No party was sure of a hearing before it; its action was subject to the approval of an executive officer, and its legislative object was not to ascertain rights, but to assist individuals to obtain rights already existing. It was in legal effect a designation of administrative officers to do administrative work.

Where parties are rightfully entitled to judicial redress and there is confessedly no other jurisdiction into which they can go, a court having the parties before it already should continue to exercise jurisdiction and should not interpose doubts and artificial refinements to save itself from the responsibility of decision.

Congress originally intended that this court should determine all questions of property rights between the Cherokee Nation and the Cherokee freedmen, and Congress subsequently gave that construction to the decision of the court and approved and ratified it. Any conclusion which will now deprive claimants of the judicial ascertainment of their rights as embodied in and expressed by the decree will be contrary to the expressed intent of Congress.

The Dawes Commission was subordinate to the Secretary of the Interior, and was merely one of the agencies given to enable him to perform the duties of his office. The duties of the Secretary were ministerial, inasmuch as he was directed to make up a roll of a slightly different date, but " in strict compliance with the decree of the Court of Claims." The subordinate agency relied upon to carry out the Secretary's own ministerial work could not be judicial if his work was merely ministerial, as we think it was.

Section 21 of the act of 1898 confirmed the "authenticated" or census roll of 1880 as a basis for the new roll except as to freed-
255 men. In the proceedings leading up to the decree of February 3, 1896, the Cherokee Nation had insisted that the freedmen and free colored persons should be restricted to those names found upon said "authenticated" or census roll of 1880. The decree secured to the freedmen a confirmation of the roll of 1880 as far as that roll went, but permitted the additional enrollment of freedmen and free colored persons who had been wrongfully left off the roll of 1880 by the Cherokee Nation. Accordingly, when Congress excepted freedmen it must have been because those bodies intended that the Dawes Commission should make another roll so as to comply with the decree of the court, inasmuch as in the concluding paragraph of the section the commission was instructed to make its freedmen roll in strict compliance with our decree. When the act of 1898 was approved by the President, if the jurisdiction conferred upon the court by the act of 1890 was impaired, no other evidence can be found of repeal except the direction contained in the act for the Dawes Commission to obey the decree of the court.

Section 21 of the act of 1898 was a ratification by Congress of the refusal of the court to restrict the roll directed by the decree of 1896 to be made—which became the Kern-Clifton roll—to the freedmen census as made by the Cherokees alone; and section 27 of the act of 1902 was a further ratification of the court's action. While by the acts of 1898 and 1902 the Kern-Clifton roll was not adopted as final, the decree which provided for it by way of supplement to the roll of 1880 intended to make it final. The Kern-Clifton roll which resulted was necessarily before the Dawes Commission subject to corrections for fraud or mistake in the matter of the identity of freedmen living and in being on the 3d day of May, 1894, to which additions were to be made as of the 1st day of September, 1902, as provided by the act of July 1 of that year.

There is no proof that the Kern-Clifton roll was made in disregard of the decree. Presumptively it was correct, not only because there were no exceptions filed to it, but it came to the court with the approval of the Secretary of the Interior as including the names of all freedmen erroneously omitted by the previous Cherokee census. There may have been mistakes in the Kern-Clifton roll, and doubtless were. But the jurisdictional act out of which grew the work of the Kern-Clifton Commission included jurisdiction not only to define rights, but to identify individuals entitled to share in these rights. 187 U. S., 382, supra.

Congress in 1898 rejected an amendment offered to the Curtis Act which if adopted would have made it the duty of the Dawes Commission to place on its rolls not only those names found on the Kern-Clifton roll, but to add to that roll "the names of all persons who applied before the commission that made the roll of freedmen in said case (Kern-Clifton) and whose names were not placed upon either said roll or the rejected roll of freedmen made by said commission in

said case, if in their (Dawes Commission) judgment the evidence offered before said commission to the Five Civilized Tribes justified their being made citizens of the Cherokee Nation in accordance with the provisions of said decree."

This amendment was designed to open the door to those freedmen who had been found by the Kern-Clifton Commission not to be entitled to citizenship. Had the amendment been adopted juris-
256 diction would have been taken away from the Court of Claims, because the Dawes Commission, instead of making its roll in strict compliance with the decree of the court, could have made it to be what in their judgment this court ought to have made it. The fact that Congress refused to adopt the amendment and restricted the Dawes Commission to make a roll in strict compliance with the decree of the court shows that it was not the purpose to take jurisdiction from the court.

Section 2 of the act of April 26, 1906, 34 Stat., 137, provided for the completion of the rolls on or before March 4, 1907. Section 3 of that act provided that the roll of Cherokee freedmen should include only such persons of African descent, either free colored or the slaves of Cherokee citizens, and their descendants who were actual, personal, bona fide residents of the Cherokee Nation August 11, 1866, or who actually returned and established such residence in the Cherokee Nation on or before February 11, 1867. This provision was not to prevent the enrollment of any person who had theretofore made application to the Dawes Commission and who had been adjudged entitled to enrollment.

The language of the court's decree of February 3, 1896, had been such as to raise the question whether freedmen, as well as free colored persons, were subject to limitation of residence or return, and it also left in doubt whether the six months expired January 19, 1867, or February 11, 1867. These doubts had been resolved by the language of the decree of February 18, 1896, and the language of this section in the act of April 26, 1906, is almost precisely the same with that of the decree. In his argument of this case counsel for the Cherokee Nation stated that he had drawn this section and procured it to be included in the act, and that his reason for this was that the Dawes Commission was placing, or was about to place, on the roll of freedmen certain persons who were not actual residents of, or who did not actually return to, the nation within the time prescribed by the treaty, because for various reasons they were considered by the Dawes Commission to have been constructive residents or to have constructively returned. Thus, the act of 1906 has practically reenacted the decree of the court, and this act can not be taken as superseding the direction of the court with respect to the manner in which the final roll should be made up.

There is no purpose apparent on the face of the last act to interfere with the decree or the direction given to carry out the decree.

With the positive directions embodied in the acts of 1898 and 1902, under which the Dawes Commission had been operating for several

years in making up the final rolls of Cherokee freedmen, to act in strict compliance with the decree of the court, there is no room for the inference that the act of 1906 directed any change in the methods directed to be made.

It is elementary that repeals by implication are not favored. They are never admitted where former directions can stand with the new act, but only where there is positive repugnancy between the two and where both acts can not be reconciled. United States *v.* Greathouse, 166 U. S., 601. This section of the act of 1906 was prepared at the instance of the attorney for the Cherokee Nation (so conceded at the argument) and could not have been intended to take away the jurisdiction of the court by practically affirming language requiring the Dawes Commission to obey the terms of the court's decree and
257 by using definitions which had their origin in the orders construing the decree of February 3, 1896—language which defined the rights of freedmen and free colored persons to be the same, and language which fixed the date of the expiration of the six months as of February 11, 1867, instead of January 19, 1867.

As further showing the intent of Congress not to depart from the directions given to secure a perfect roll, it appears that, pending the passage of the act of April 26, 1906, supra, an amendment was offered which provided for the enrollment of colored persons "who were taken from the nation or driven therefrom under circumstances which were beyond their control, and who did not, subsequent to August eleventh, eighteen hundred and sixty-six, make applications for citizenship in any other tribe." But this amendment was rejected. Its acceptance would have permitted the enrollment of those persons whom this court, by order of April 15, 1896, ordered the Kern-Clifton Commission to reject. Cong. Rec., Jan. 18, 1906, H. bill 5976, 1st sess. 59th Cong.

Some decisions have been cited in support of the proposition that the jurisdiction of this court ended with the decree of February 3, 1896, and that exclusive jurisdiction was conferred upon the Dawes Commission to make a roll, subject only to the supervision of the Secretary of the Interior. If these cases have any effect at all upon the decree they also supersede the provisions of section 21 of the act of 1898, and section 27 of the act of July 1, 1902.

In Buffington's case, Ann. Rep. Int. Dep., 1904, pt. 2, p. 161, proceedings were instituted to compel the Secretary of the Interior to confine the Dawes Commission to the enrollment of those freedmen found on the authenticated or census roll of 1880, which would have been in violation of the decree of the Court of Claims. The bill was dismissed with the statement that the jurisdiction of the Court of Claims had ended. This concluding statement was obiter dicta and not necessary to the decision of that cause.

In Kimberlin's case, 104 Fed. Rep., 716, it was said that the Dawes Commission was invested with judicial power, from which we are to infer because of that statement that its jurisdiction superseded that of the Court of Claims. But in Wallace v. Adams, 204 U. S.,

415, the same learned judge defined the commission to be a part of the executive branch of the Government. That is what we think of its status. The Supreme Court thought so, too, as the Wallace case was affirmed by the Supreme Court.

Congress, by section 25 of the act of 1898, 30 Stats., 495, authorized the Delawares to bring a suit in this court against the Cherokee Nation and the United States for rights not adjudicated to them in the case of Journeycake, 155 U. S., 196, which had been decided in this court under the jurisdictional act of 1890—under which the court is proceeding in this case. It is now contended that because that act was passed it was necessary to have been passed before the Delawares could have authority to maintain their second suit, and because the act was passed with reference to the Delawares it is now necessary that a similar act be passed with reference to the freedmen, before these proceedings can be maintained by them.

In entertaining jurisdiction under the provisions of section 25 of the act of 1898 the Supreme Court decided that the decree in Journeycake's case was proper so far as it went. The decree in that
258 case, while it had fully defined and established the rights of the Delawares in the common property of the nation, had not extended to the special or peculiar rights which would remain in such original or registered Delawares as might be surviving when that property should come to be distributed, though its jurisdiction was broad enough to have permitted it to do so. That was the only question decided in the second Delaware case, 193 U. S., 127, and it might have been decided in the first case without exceeding the jurisdiction conferred by the act of 1890.

The supplemental petition of the freedmen does not seek to have new rights defined, but does seek to have established rights enforced.

It is again contended that since Congress has provided that the action of the Secretary of the Interior in approving the Dawes rolls shall be final the court can not now disturb it. But in Goldsby's case, 211 U. S., 249, it appeared that the Secretary had finally approved the Dawes rolls without including Goldsby, who thereupon sought to compel the Secretary to place his name on the rolls notwithstanding the fact that the rolls had been finally approved. The Secretary was ordered to enroll Goldsby, and this judgment was affirmed by the Supreme Court. Mr. Justice Day, for the court, declared that—

"We appreciate fully the purpose of Congress in numerous cases of legislation to confer authority upon the Secretary of the Interior to administer upon Indian lands, and previous decisions of this court have shown its refusal to sanction a judgment interfering with the Secretary where he acts within the powers conferred by law. But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action."

Under these decisions we do not see the application of the last case invoked by the defendants. Garfield, Secretary of the Interior, v. United States ex rel. Lowe, 34 D. C. App. The only question determined in Lowe's case was that after the partial list of rolls had been sent up by the Dawes Commission and approved by the Secretary of the Interior, he still had the right after notice and hearing and upon proof of fraud to strike from these rolls the names of persons improperly placed upon them by the Dawes Commission. The learned judge delivering the opinion in the Lowe case does not seem to have had his attention directed to any of the questions involved in the present matter and particularly to the express injunction contained in section 21 of the act of 1898 that "they shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims."

It remains to more fully consider whether a proceeding by mandamus be the proper remedy, if there be a remedy for these petitioners in another jurisdiction rather than the present proceeding under the supplemental petition.

It has been suggested that if rights have been conferred upon the freedmen by Congress since the jurisdictional act of which they have been denied, then their remedy is by mandamus rather than by a renewal of their action in this court.

259 But it is manifest that since the decree of February 3, 1896, no new rights have been conferred. Petitioners' first suit was not an action at law brought to recover damages, but a suit in equity prosecuted by them as beneficiaries of a trust against a trustee for the execution of that trust. As the decree of February 3, 1896, has never been satisfied, its terms have not been exhausted.

In Anderson v. United States, 9 Wall. R., 56, there was presented the proposition "that the Court of Claims had no authority to render judgment for a specific sum, the power of the court being limited to the point of deciding whether the claimant was entitled to recover at all, leaving the amount to be determined by computation by the proper officers of the Treasury Department." The contention there was analogous to the contention now made in this case. But the court declared that to sustain the position contended for in Anderson's case would require the appellate tribunal to hold that Congress intended to constitute this court (having power to render the decree) a mere commission, which contention was disposed of by the further declaration of the court that it would "not attribute to Congress a purpose that would lead to such a result, in the absence of an express declaration to that effect."

This court has the undisputed power not only to decree the payment of money from the Treasury—which necessarily involves the power to carry out a decree for that purpose—but, as provided by section 1070 of the Revised Statutes, may exercise such powers as are necessary to carry into effect the powers granted to it by law.

Mandamus is a legal remedy for a legal right granted where there is no specific legal remedy and to prevent that defect of legal justice

which would otherwise ensue. Brown v. United States, 6 C. Cls. R., 187. The writ is a remedy to compel any person, corporation, public functionary, or tribunal to perform some duty required by law where the party seeking relief has no other legal remedy. Knox County v. Aspinwall, 24 How., 376. It is granted to a party where the law affords him no other adequate means of redress. Kendall v. Stokes, 3 How., 87. But it is not the remedy under the conditions of this case. Nor do we think that it is any remedy at all in any other forum where it appears that this court has entered its decree fixing rights now denied. We can not abandon the decree and its consequences and leave the parties without redress if rights fixed by the decree are shown to the court to have been denied. At least it is not for this court to say so.

In requiring the Dawes Commission to adhere strictly to the decree of this court in making a roll there is no indication that the appropriate remedy may not be invoked if it reasonably appears that there has been a departure from the directions of Congress. Certainly where two special jurisdictions appear to have been created by acts of Congress for special purposes, one of them possessing judicial power in a constitutional sense and the other not invested with that kind of power, persons whose rights are affected should have the benefit of a decree fixing and establishing their rights in such substantial form that the administrative body without judicial power can not ignore. Especially is this so in the face of the positive declarations of Congress that the special body named by subsequent legislation must observe the adjudication of the court having original jurisdiction. If there be a doubt as to the right of the Court of Claims to carry out the original and repeated intention of Congress—which intention seems never to have been abandoned—they should have the benefit of such doubt.

260

The court is of opinion that a decree should now be entered requiring the Secretary of the Interior to give to those freedmen and free colored persons whose names were placed upon the Kern-Clifton roll in obedience to the decree of this court, but were omitted from the Dawes Commission roll full participation in the distribution of the property of the Cherokee Nation.

for the plaintiff herein to further costs and allowances be reserved to be hereafter determined and fixed by the court, and the court reserves the right to make all such further orders in aid hereof as to it may seem meet.

It is hereby stipulated and agreed on the part of the complainant and on the part of the defendant, the Cherokee Nation, that the foregoing decree be entered in this case in the place and stead of the decree entered and filed May 8, 1895, in this case, and that it be entered nunc pro tunc as of that date, to wit, May 8, 1895, and that the application for an appeal filed by the complainant and the application for an appeal and motions for a rehearing and for a new trial filed by the said defendant be mutually withdrawn upon the entry of this corrected decree.

Dated Washington, February 3, 1896.

ROBERT H. KERN,
Attorney for the Complainant.
E. C. BOUDINOT,
MAXWELL & CHASE,
Attorneys for the Cherokee Nation.
S. H. MAYES,
Principal Chief of the Cherokee Nation.

The defendants, the United States, offer no objection to the entry of the amended decree as provided in this stipulation.

_____,
Assistant Attorney General.

The decree of February 20, 1911.

Court of Claims.

MOSES WHITMIRE
v.
THE UNITED STATES ET AL. } No. 17209.

In this case the court ordered that the following decree be entered:

It is therefore, this twentieth day of February, 1911, ordered, adjudged, and decreed by the court that the said decree of this court passed on the third day of Februray, 1896, be, and the same hereby is, construed to vest in all the persons whose names were placed on the roll made in obedience to said decree, known as the Kern-Clifton roll, and in their descendants born after the third day of May, 1894, and before the 4th day of March, 1907, the right of citizenship in the Cherokee Nation, and that so many of said persons and their said descendants as were living on the 4th day of March, 1907, were and are entitled to participate in the allotment of the common lands and the distribution of the common funds of said nation in the same manner and to the same extent as Cherokee citizens of Cherokee blood or parentage may have been or may be hereafter entitled, and that in any distribution of the common lands or the common funds of said nation among the citizens thereof by distribution per capita the defendant, the Cherokee Nation, and the defendant, the United States, as trustee of the Cherokee Nation, be enjoined and prohibited from making any discrimination between the said persons so

placed on the said Kern-Clifton roll and other Cherokee citizens. And it appearing to the court that the roll made by the Dawes commission and approved by the Secretary of the Interior does not include and contain the names of the following freedmen and free colored persons of the Cherokee Nation who were living and in being on May 3, 1894, and whose names were placed on the roll of the said nation by the Kern-Clifton Commission under the decree of this court of February 3d, 1896, and which decree was assented to by the Cherokee Nation and accepted by said parties as true and correct:

Name.	Kern-Clifton No.	Name.	Kern-Clifton No.
Alberty, Carrie	3	Vann, Sarah	514
Burgess, William	34	Bean, Rufus	516
Anderson, Jane, née Burgess	38	Eaton, Lucy	520
Hall, Amanda, née Daniels	54	Eaton, Loney	521
Rowe, Louis	82	Johnson, Rachel	533
Rowe, Chaney	83	Dennis, Isabel	547
Buffington, Florence	86	Dennis, Bertha	548
Buffington, Ishmas	87	Dennis, Laura	549
Buffington, Henrietta	88	Dennis, Amanda	550
Vann, Sank (or Sam)	124	Dennis, Clem	553
Vann, Albert	129	Adams, Cora	557
Lynch, Fredonia	136	Adams, Grant, alias Emanuel	560
Thompson, Ellen	140	Adams, Cora, duplicate of No. 557	562
Thompson, Hamay	141	Adams, Grant, duplicate of No. 560	565
Thomas, Stella	144	Adams, Jesse	566
Ross, Lizzie	146	Foreman, Lester	543
Ross, Tom	150	Nave, Flora	574
Foster, Lavinia, alias Mary	158	Gibson, Luther	575
Foster, Martha	162	Vann, William	577
Foster, Sue	164	Vann, Alice, or Sarah	578
French, Linda	166	Landrum, or Johnson, Sidney	583
Downing, Lou	182	Johnson, John	586
Kirk, Emma	185	Chambers, Charles	589
Sanders, Polly	193	Brown, Jesse	601
Foster, Jetta	208	Brown, Lucinda	602
Coody, Louis	214	Brown, Lubertha	604
Taylor, Mary	235	Brown, Oce	606
Taylor, Fred	236	Brown, Mary	608
Taylor, Henry	239	Grimmett, Cora	615
Lasly, Geo. W	256	Grimmett, Lewis	618
Lasly, Clara	259	Ward, William	629
Williams, Judy	270	Vann, Upton	634
Foster, Cora	276	Pack, Willie	639
Bean, Maud	285	Peterson, Josie, née Whitmire	655
Vann, Melgy	298	Nave, William	695
Vann, James	302	Moore, John	695
Martin, Ralph	313	Nave, Rosella	701
Vann, Took	319	Rogers, Nick	711
Frye, Viola	326	Martin, Elizabeth	716
Frye, Harvey	330	Whitmire, Kate	723
Bryan, Nancy	341	Nave, Lucinda	735
Weber, Davis	348	Wright, Lucinda	745
Weber, George Henry	351	Vann, Sam	750
Whitmire, Dick	357	Weber, Rosie	763
Whitmire, Walter	358	Ratcliffe, Eliza	785
Murrell, Sarah	361	Rider, Lucy	787
Murrell, Daisy	362	Vann, Henry	806
Murrell, Susan	369	Vann, Lamon	814
Vann, Eli	373	Woodward, James	820
Vann, Polly, nee Rider	374	Markham, Willis	837
Rider, Lena	380	Ross, Ruth	853
Rider, Mabel	382	Vann, George	859
Rider, Frank	383	Rogers, Lizzie (wife of Ben Vann)	860
Leek, Albert	398	Wright, Louis	877
Bean, Ebey	403	Anderson, Hannah	889
Williams, Arthur	418	Vann, Jennie	893
Landrum, Clida	433	Anderson, Lucy	896
Landrum, Fravies	434	Rogers, Sydney	901
Landrum, Sam	439	Webber, Dug	908
Sutton, Sallie	441	Webber, Amanda	910
Lampton, Eliza, née Adair	446	Stidman, Dolly	913
Hughes, Sarah	452	Stidman, Tom or Will	915
Landrum, Andy	464	Johnson, Mary	918
Landrum, Lone	465	Lasly, Andy	937
Bean, Evey	479	Thornton, Nancy	951
Lynch, Martha	507	Jones, May	964

Name.	Kern-Clifton No.	Name.	Kern-Clifton No.
Sheppard, Thomas	971	Keys, Phoebe	1494
Beck, James	975	Thompson, Cora, née Carter	1500
Beck, Jennie	977	Carter, Will	1501
Grimmett, Lillie	984	Drew, Willie	1523
Nevins, John	990	Drew, Allie	1524
Tucker, Nannie	1006	Drew, Gussie	1525
Riley, Louisa, duplicate of No. 2199	1007	Drew, Jennie	1526
Riley, Dave, duplicate of No. 2200	1008	Smith, Ibby	1529
Ross, Ruth	1021	Smith, Wash	1530
Fields, William	1035	Crossland, Abe	1543
Mackey, Amanda	1036	Crossland, Morris	1549
Austin, Louis	1039	Ford, Julia, née Vann	1553
Tyner, Nancy, née Nevins	1044	Ford, Nan	1554
Tyner, Ed	1045	Shepard, Sue	1567
Tyner, Jessie	1046	Foreman, Delilah	1575
Smith, Esther, née Vann	1049	Brown, Fannie	1586
Walker, Violet, now Ross	1054	Brown, Robert	1588
Brewer, Andrew	1062	Whitmire, Turner	1592
Brewer, Fannie	1063	Whitmire, Polly	1594
Schrimsher, Maud	1064	Whitmire, Ella	1595
Schrimsher, Mary	1065	Johnson, Frank	1598
Brown, John	1076	Johnson, Harvey	1601
Walker, John	1089	Drew, Henrietta	1616
Walker, Ada	1090	Mackey, Kate	1626
Lowery, Jeannett	1105	Snow, Willie	1636
Smith, Tenah	1112	Glass, Millie, or Foreman	1653
Vann, David	1116	Laflace, Jake	1671
Williams, Henry	1122	Schrimsher, Fred	1672
Alberty, Delilah	1131	Schrimsher, William	1678
Alberty, Ruben	1133	Mackey, Perry, jr	1682
Wilson, Isaac	1138	Jones, Mary, née Mackey	1683
Wilson, Peggie	1141	Baldridge, Peter	1687
Davis, Abe	1148	Brewer, Frances	1690
Davis, Will	1149	Brewer, Catherine	1691
Parks, Nellie	1170	Crossland, Ella	1694
Parks, Mack	1171	Vann, Lucinda, née Sheppard	1701
Nevins, Patsy	1180	Webber, Bertha, duplicate of No. 794	1713
Vann, Butler	1181	Nave, or Watson, Cora	1722
Vann, Derce	1187	Naves, or Watson, Jane	1723
Thompson, Peg, née Vann	1203	Nave, or Watson, Dave	1724
Ford, Carrie, née Brewer	1220	Nave, or Watson, Walter	1725
Sanders, Noah	1222	Taylor, Patsy	1727
Sanders, Sarah	1223	Crossland, Sally, née Vann	1730
Lee, Annie	1227	Crossland, Lula	1731
Nave, Henry	1228	Riley, Sol	1761
Thompson, Rube	1237	Riley, Lucinda	1762
Johnson, Aaron	1253	Riley, Charles	1770
Cornish, Tom	1255	Riley, William	1768
Thompson, Mose	1257	Drew, William	1796
Mackaye, Crockett	1258	Walker, Lizzie, née Drew	1797
Sheppard, Wash	1263	Crapo, Butler	1806
Sheppard, Curtis	1265	Fields, Mary	1808
Mayfield, Nellie	1269	Fields, Emma	1809
Mackey, Jennie	1277	Benge, Neg	1821
Bean, Mary	1291	Wright, Maggie	1829
Ross, Mary	1303	Shoate, George	1838
Aldrich, Dennis	1328	Shoate, Sam	1839
Pin, Sarah, née Bean	1330	Crapo, Eva	1847
Petitt, Eben	1337	Beck, Alex	1853
Humphries, Bessie	1342	Crapo, Joanna	1875
Hudson, Emma	1345	Mayes, Mary, née Forman	1881
Vann, Ed	1356	Mackey, Mose	1886
Vann, Judy	1357	Alberty, Irvin	1894
Thompson, Esther	1358	Alberty, Mollie	1895
Johnson, Aaron, duplicate of No. 1253	1387	Ross, Ellis	1899
Johnson, Emmett	1388	Vann, Charles	1900
Mackey, Alice	1392	Parris, Henry	1911
Brown, Josephine	1404	Brown, Francis, duplicate of No. 1690	1933
Brown, Joseph	1409	Ross, Laura	1966
Vann, Solomon	1410	Irons, Jerry	1968
Vann, Dennis	1411	Irons, Ned	1970
Vann, Jeanna	1412	Ross, Ann	1989
Vann, or Young, Gus	1424	Ross, Lucy, née Whitmire	1990
Vann, William or Jacob	1428	Dydas, Rachel, née Grimmett	1998
Vann, Rachel	1435	Johnson, Maud	2004
Vann, Walter	1444	Fields, Simon	2006
Vann, Crow	1447	Fields, Simon	2008
Vann, Rose	1448	Ross, John	2013
Landrum, Cudge or Carrie	1456	Fields, Mary	2016
Landrum, Clarence	1457	Johnson, Evan	2017
Landrum, Joe	1458	Warford, Sam	2032
Coody, Lydia	1469	Warford, Ed	2034
Keys, Dora	1490	Warford, Jim	2035

Name.	Kern-Clifton No.
Warford, Meizie	2043
Johnson, Sidney, duplicate of No. 583	2045
Johnson, Johnson, duplicate of No. 586	2046
Keys, Louis	2063
Eagle, Kathleen	2066
Irons, Dora	2078
Carter, Maria	2081
Carter, Dick	2084
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Sheppard, Nancy	2092
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Waite, Andrew T	3582
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Waite, Rufus	3584
Waite, Maggie	3585
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Waite, Joe	3587
Waite, Cora	3588
Waite, Hannah	3589
McLean, Joe	3590
Vann, Eddie	3591
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Smith, Jane	3627
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Pack, Signore	4278
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Pack, Albertha	4282
Pack, Clarence	4283
Pack, Sarah	4284
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Pack, Mary, now Meadows	4286
Pack, Annie	4287
Webber, Margaret	4288
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Hamilton, Andrew	4341
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Daniels, Abraham	4461
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Name.	Kern-Clifton No.	Name.	Kern-Clifton No.
Bell, Tom	4463	Bell, July	4503
Bell, Tensie	4464	Harris, Agnes	4504
Bell, George C	4465	Harris, Billy	4505
Bell, Viola	4466	Harris, Dave	4506
Bell, Effie	4467	Harris, Charles	4507
Bell, Emily Jane	4468	Harris, Silas	4508
Brown, Loretta	4469	Harris, Mamie	4509
Bell, Nancy Ann	4470	Harris, Minnie	4510
Lewis, Georgianna	4471	Harris, Isaac	4511
Lewis, Tennessee	4472	Tucker, George	4512
Williams, Benny	4473	Mays, Sarah	4513
Williams, Matty	4474	Mays, Eva	4514
Bell, Arthur	4475	Mays, Cora	4515
Moss, Sarah	4476	Mays, Jesse	4516
Moss, George	4477	Mays, Homer	4517
Moss, Julia	4478	Mays, Lurena	4518
Moss, Sanford	4479	Mays, Andrew	4519
Moss, Howard	4480	Hill, Senia	4520
Moss, Samantha	4481	Hill, Rebecca	4521
Moss, Rutherford	4482	Hill, John	4522
Moss, Elmira	4483	McPherson, Betsy	4523
Moss, Dwight	4484	Watson, Mary	4524
Duffin, Frances	4485	Watson, Lee	4525
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Duffin, Josh	4487	McLish, Lurena	4527
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And it further appearing that the Secretary of the Interior has not permitted and is not permitting any of the said freedmen and free colored persons above set out to participate with the other citizens of the Cherokee Nation in the distribution of the common property.

It is therefore further ordered, adjudged, and decreed that the Secretary of the Interior be, and he hereby is, enjoined and directed to place upon the roll of citizens of the Cherokee Nation, authorized and directed by the acts of June 28, 1898, July 1, 1902, and April 26, 1906, the names of as many of the said freedmen and free colored persons and the names of as many of their descendants, born after the 3d day of May, 1894, and before the 4th day of March, 1907, as may have been living on the 3d day of March, 1907.

It is further ordered, adjudged, and decreed that the Secretary of the Interior be, and he hereby is, enjoined and directed to pay to each of the said persons so placed on the said final roll of citizens of the Cherokee Nation their proportionate share of any monies belonging to the said nation that may have been, since June 28, 1898, or may hereafter be, distributed per capita, among the citizens of said nation, and to allot to each of them their proportionate share of the lands of said nation, and in taking said allotments each of said persons shall have the same rights, immunities, and privileges in the matter of homestead selections and in all other respects as has been or is provided by law for other citizens of said nation.

Filed February 20, 1911.

BY THE COURT.

273 *Subsequent proceedings.*

On March 30, 1911, the defendants filed an application for appeal.

On May 15, 1911, the defendants filed a motion to withdraw the application for appeal filed March 30, 1911, which was allowed by the court May 15, 1911.

On May 15, 1911, the defendants filed a motion for a new trial, which is as follows:

Motion for a new trial.

Now come the defendants, by their Attorney General, and move the court to grant unto them a new trial upon the ground of errors of law and fact in the decree rendered by the court on February 20, 1911, and upon the further ground of important evidence discovered by the said defendants since the rendition of said decree.

JOHN Q. THOMPSON,
Assistant Attorney General.

Filed May 15, 1911.

274 *Order of court overruling defendants' motion for new trial. Filed June 5, 1911.*

Order.

This cause coming on to be heard on the motion of the defendants, by their Attorney General, to grant unto them a new trial upon the ground of important evidence alleged to have been discovered by them since the rendition of the final decree in the cause, and the court having considered the same, it is now ordered that the said motion be, and the same is hereby, overruled, because (1) upon examination of the alleged important evidence stated to have been discovered (and which has been filed) the court finds that the said evidence so filed is essentially and practically the same as that heretofore considered by the court before the decision and final decree entered in the case; and because (2) the evidence alleged to have been discovered is immaterial to the further consideration of the questions involved in the issues of the case.

The motion of defendants to grant a new trial upon the ground of errors of law and fact having been duly considered, the same be, and the same is hereby, overruled, with privilege to the defendants to renew their application for appeal heretofore filed.

BY THE COURT.

Filed June 5, 1911.

275 *Application for, and allowance of, an appeal to the Supreme Court of the United States.*

In the Court of Claims. December term, 1910.

MOSES WHITMIRE, TRUSTEE FOR THE FREEDMEN OF the Cherokee Nation,
vs.
THE CHEROKEE NATION AND THE UNITED STATES. } No. 17209.

Application for appeal.

From the decree rendered in the above-entitled cause on the 20th day of February, 1911, in favor of claimants, the defendants, by the Attorney General of the United States and the national attorney for the Cherokee Nation, on the 17 day of June, 1911, make application for, and give notice of, an appeal to the Supreme Court of the United States.

JOHN Q. THOMPSON,
Assistant Attorney General.
WILLIAM W. HASTINGS,
National Attorney for the Cherokee Nation.

Filed June 17, 1911.

The above application of the defendants for the allowance of appeal filed June 17, 1911, is allowed as prayed for this 17th day of June, 1911.

STANTON J. PEELLE,
Chief Justice.

276 In the Court of Claims.

MOSES WHITMIRE, TRUSTEE FOR THE FREEDMEN of the Cherokee Nation,
vs.
THE CHEROKEE NATION AND THE UNITED States. } No. 17209. In Equity.

I, John Randolph, assistant clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the evidence for the complainants and defendants filed in said cause; of orders and opinions and decrees filed by the court; of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of the Court of Claims this first day of July A. D., 1911.

[SEAL.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

(Endorsement on cover:) File No. 22811. Court of Claims. Term No. 735. The Cherokee Nation and the United States, appellants, vs. Moses Whitmire, trustee for the freedmen of the Cherokee Nation. Filed July 21st, 1911. Filed No. 22811.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE CHEROKEE NATION AND THE UNITED States, appellants,
v.
MOSES WHITMIRE, TRUSTEE FOR THE freedmen of the Cherokee Nation.
No. 735.

APPEAL FROM THE COURT OF CLAIMS.

MOTION TO ADVANCE.

On behalf of the United States, the Solicitor General respectfully moves the court to advance the above-entitled cause, for the following reasons:

(1) This is an appeal on behalf of the United States from a supplemental decree passed by the Court of Claims on the eleventh of February, 1911, the original decree of that court in this cause having been passed, by consent of all parties, on the third day of February, 1896.

Jurisdiction was conferred upon the Court of Claims to determine certain questions which had arisen between the Cherokee Nation and the freedmen, as well as the Shawnee and Delaware Tribes of Indians, by the act of Congress of October 1, 1890. (26 Stat., 636.)

Subsequent to the passage of the decree of February 3, 1896, a distribution was made to the individual freedmen, as provided for in that decree, amounting to nearly one million dollars, but when the Dawes Commission was about completing its work of enrolling the members of the Cherokee Nation, as well as the Cherokee freedmen, it was claimed that said commission had omitted from its roll nearly two thousand persons who were Cherokee freedmen, and the Court of Claims has so held in the supplemental decree, which is the subject of the present appeal.

The supplemental decree of the Court of Claims of February 11, 1911, awards to these two thousand persons as being Cherokee freedmen the rights which they claim, and the Government has appealed from this supplemental decree.

(2) It will be seen from the above statement that it is practically impossible for the Interior Department to proceed further in the distribution of the common funds, lands, and property of the Cherokee Nation until the questions involved in this case shall have been determined by your honors, because not only are the rights of these two thousand alleged Cherokee freedmen involved, both in the lands and in the funds of the Cherokee Nation which are to be allotted and divided, but because upon the question of whether they are entitled to participate at all depends the divisor by which the dividends or proportionate shares of all

individual Cherokees may be determined, as well as, in some instances, the identity of the specific lands to be allotted.

(3) It is respectfully submitted that it is most desirable that the questions involved may be determined as speedily as possible, in order that the affairs of the Cherokee Nation may be promptly settled and its lands and common property divided and distributed in severalty in accordance with the policy of the Congress of the United States with reference to the affairs of the Five Civilized Tribes.

Notice of this motion has been served upon opposing counsel and they concur therein.

F. W. LEHMANN,
Solicitor General.

OCTOBER, 1911.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 735.

THE CHEROKEE NATION AND THE UNITED STATES, APPELLANTS,

vs.

MOSES WHITMIRE, TRUSTEE FOR THE FREEDMEN OF THE CHEROKEE NATION, APPELLEES.

BRIEF FOR CHEROKEE NATION.

Statement of the Case.

This case comes to this court upon appeal from a decree of the Court of Claims dated February 20, 1911, and an order of that court entered June 5, 1911, overruling appellants' motion for a new trial, enjoining and directing the Secretary of the Interior to enroll upon the final roll of citizens of the Cherokee Nation for allotment of lands the names of certain persons and their descendants claiming rights as Cherokee freedmen whose names were found upon the Kern-Clifton roll, but who after several years of investi-

gation were found not entitled to be enrolled for such purposes by the Secretary of the Interior.

Congress, by the act of October 1, 1890 (26 Stat., 636), conferred jurisdiction upon the Court of Claims, with the right of appeal by either party to the Supreme Court, to determine the rights of those claiming as Delawares, Shawnees or freedmen citizens of the Cherokee Nation as a class, and to award judgment, if anything be found due, for their proportionate share of the money paid out per capita to Cherokees by blood to their exclusion. Prior thereto a number of per capita payments had been made by the Cherokee Nation to citizens by blood out of the proceeds derived from the leasing or sale of lands west of 96° west longitude. Suit was instituted on behalf of the freedmen in the name of Moses Whitmire, trustee, *vs.* The Cherokee Nation and The United States in the Court of Claims, and a final decree was entered February 3, 1896. The rights of the freedmen, *as a class,* were determined, and a money judgment of $903,365.00 was awarded them because of their exclusion from previous per capita payments, and the same was distributed in February, 1897, by the Secretary of the Interior upon a roll made by Commissioners appointed by him and under his supervision. The Court of Claims declined to instruct these Commissioners, holding that the Secretary of the Interior had exclusive jurisdiction. This roll was known as the Kern-Clifton roll, taking the name of two other Commissioners who made it.

Congress, by section 21 of the act of June 28, 1898 (30 Stat., 495), the act of May 31, 1900 (31 Stat., 221), sections 25 to 31, inclusive, of the act of July 1, 1902, and section 3 of the act of April 26, 1906 (34 Stat., 137), directed the Commission to the Five Civilized Tribes to make a final roll of all of the citizens of the Cherokee Nation, including freedmen, for allotment purposes. Under these acts rolls were made and finally approved by the Secretary of the Interior on or before March 4, 1907.

After an exhaustive investigation by the Commission to the Five Civilized Tribes, extending over a period of seven years, a final and new roll of citizens of the Cherokee Nation was completed, including such freedmen as were found to be entitled, but some of those enrolled in 1897, and to whom the money judgment was disbursed, were found not to be entitled under the decree of February 3, 1896, and subsequent legislation, and were upon re-examination excluded from the final roll of citizens for allotment purposes.

The supplemental petition was filed in this case on May 6, 1908 (Rec., p. 48), more than twelve years after the decree of February 3, 1896, was entered, and is, in effect, a petition for a writ of mandamus to compel the Secretary of the Interior to reopen the freedmen roll after it had been closed by law, and to enroll those persons as freedmen citizens of the Cherokee Nation whose enrollment was rejected by the Secretary of the Interior as not being entitled under the decree of the Court of Claims of February 3, 1896, and subsequent legislation, after a most careful and searching investigation extending over seven years. Call this proceeding what you will, the supplemental decree prayed for is to that effect.

By the act of April 26, 1906 (34 Stat., 137), section 2, it was provided:

> "That the rolls of the tribes affected by this act shall be fully completed on or before the fourth day of March, 1907, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date."

We respectfully submit that no court could, by decree, compel the Secretary of the Interior to approve the enrollment of any one after the expiration of the time within which he was authorized by law to approve the enrollment. He has no authority to approve the enrollment of any one except such as is conferred by acts of Congress.

> "Executive officers derive their powers from the statutes. Not only must an officer have jurisdiction of the subject-matter, but he must also keep within the limits of the power conferred on him by statute."
> United States *vs.* McDaniel, 7 Peters, 1-14.
> United States *vs.* Thurber, 28 Fed. Rep., 56.

This case involves the enrollment of a large number of persons, some 1,200 or 1,500, claiming to be freedmen citizens of the Cherokee Nation, which is sufficient justification for asking the consideration of this court upon appeal.

The Commission to the Five Civilized Tribes since Congress passed the act of June 10, 1896 (29 Stat., 321), until March 4, 1907, the date fixed by section 2 of the act of April 26, 1906, *supra,* for finally closing the rolls, had been engaged in making the rolls of the citizens of the Five Civilized Tribes, including freedmen, and the allotment of the lands to the enrolled citizens. Year after year large sums were appropriated by Congress and the authority of the Commission continued and enlarged. The reports of the Commission filed as evidence for the defendants in this case (Rec., pp. 79-100), show the work of the Commission in detail. The Commission began the active making of the final rolls of the citizens of the Cherokee Nation on May 11, 1900, sat at convenient places all over the country, heard each application separately, and the testimony in each case was stenographically taken down, the testimony of all witnesses, both for and against each applicant, was taken, the applicants and the Cherokee Nation were represented by attorneys, and judgments were rendered in each case, copies were served upon the respective applicants and the Nation, and these judgments were forwarded through the Commissioner of Indian Affairs to the Secretary of the Interior for his final approval. At the end of seven years' tedious work the rolls were, on March 4, 1907, finally completed and approved. The Cherokee land office was opened the 1st of January, 1903, and practically all the lands have been allotted and patents issued and delivered. It is now sought to

have these rolls reopened, so far as freedmen are concerned, and this work gone over. In the meantime restrictions have largely been removed upon the alienation of the lands, titles passed to innocent purchasers for value, and these titles would be clouded if the rolls were reopened, because the enrollment of rejected applicants will necessitate the reopening of the land contest cases, long since finally adjudicated between those now enrolled.

History of the Case.

By article 9 of the treaty of July 19, 1866 (14 Stat., 799), entered into between the Cherokee Nation and the United States, it was provided:

> "They [the Cherokee Nation] further agree that all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion and are now residents therein, or who may return within six months, and their descendants shall have all the rights of native Cherokees."

The Cherokee Nation construed this language to confer only political rights upon freedmen entitled to citizenship in the Cherokee Nation under it, namely, the right to vote and to occupy or use the surface of the land, but not to confer upon them any property rights or interest in the lands and moneys belonging to the tribe. The freedmen paid nothing for their citizenship. Following this construction the Cherokee Nation excluded the freedmen from participation in per capita payments made by the Nation to Cherokees by blood in 1883, 1886, 1890, and 1894. The Delaware and Shawnee citizens of the Cherokee Nation were also excluded because the money distributed per capita was derived from the sale and lease of lands west of the 96° of west longitude, whereas the Cherokees contended they were only entitled to an interest in the lands and the proceeds de-

rived therefrom east of the 96° of west longitude and their invested funds.

The attention of Congress having been called to the exclusion of the Delaware, Shawnee, and freedmen citizens from participation in the per capita payment made in 1883, by the act of October 19, 1888 (25 Stat., 609), appropriated the sum of $75,000, and made the same a lien upon the lands of the Cherokee Nation west of the Arkansas river, and by the act of March 2, 1889 (25 Stat., 994), the Secretary of the Interior was authorized and directed to make a roll of the freedmen entitled to share in the distribution of the said sum of $75,000. Under this act a Commissioner by the name of Wallace was appointed to make the roll, and when made, corrected, and approved by the Secretary of the Interior it was called the "Wallace roll." By the act of March 2, 1889, *supra*, the Secretary of the Interior was also directed to investigate and report to Congress what other sums, if any, had been paid out per capita by the Cherokee Nation to the exclusion of the freedmen.

The freedmen had also been excluded by the Cherokee Nation from participating in the per capita payment of 1886, and Congress, by the act of October 1, 1890 (26 Stat., 636), conferred jurisdiction upon the Court of Claims, with the right of appeal to either party to the Supreme Court, to determine the matter, which jurisdictional act is as follows:

> *"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That full jurisdiction is hereby conferred upon the Court of Claims, subject to an appeal to the Supreme Court of the United States, as in other cases, to hear *and determine* what are the just rights in law or in equity of the Shawnee and Delaware Indians who are settled and incorporated into the Cherokee Nation, Indian Territory, east of ninety-six degrees west longitude, under the provisions of article fifteen of the treaty of July nineteenth, eighteen hundred and sixty-six, made by and

between the United States and the Cherokee Nation and articles of agreement made by and between the Cherokee Nation and the Shawnee Indians June seventh, eighteen hundred and sixty-nine, approved by the President June ninth, eighteen hundred and sixty-nine, and articles of agreement made with the Delaware Indians April eighth, eighteen hundred and sixty-seven, *and also of the Cherokee freedmen* who are settled and located in the Cherokee Nation under the provisions and stipulations of article nine of the aforesaid treaty of 1866 in respect to the subject-matter herein provided for.

"SEC. 2. That the said Shawnees, Delawares, and freedmen shall have a right, either separately or jointly, to begin and prosecute suits against the Cherokee Nation and the United States Government *to recover from the Cherokee Nation all moneys* due either in law or equity and unpaid to the said Shawnees, Delawares, or freedmen which the Cherokee Nation have before paid out, or may hereafter pay, per capita, in the Cherokee Nation, and which was, or may be, refused to or neglected to be paid to the said Shawnees, Delawares, or freedmen, by the Cherokee Nation, *out of any money or funds* which have been, or may be, paid into the treasury of, or in any way have come, or may come, into the possession of the Cherokee Nation, Indian Territory, *derived from* the sale, leasing, or rent for grazing purposes on Cherokee lands west of the ninety-sixth degree of west longitude, and which have been, or may be, appropriated and directed to be paid out per capita by the acts passed by the Cherokee council, and for all moneys, lands, and rights which shall appear to be due to the said Shawnees, Delawares, or freedmen under the provisions of the aforesaid articles of the treaty and articles of agreement.

"SEC. 3. That the said suit or suits may be brought in the name of the principal chief or chiefs of the said Shawnee and Delaware Indians, and for the freedmen and in their behalf and for their use in the name of some person as their trustee, to be selected by them, with the approval of the Secretary of the Interior. And the exercise of such jurisdiction shall not be barred by any lapse of time heretofore, nor

shall the rights of such Indians be impaired by any acts passed and approved by the Cherokee national council. Suits may be instituted within twelve months after the passage of this act, and the law and practice and rules of procedure in such courts shall be the practice and law in these cases and copies of petitions filed in the case at the commencement of the suit shall be served upon the Attorney General of the United States and on the principal chief in the Cherokee Nation by the marshal of the District Court for the Indian Territory; and that the costs of said suits shall be apportioned between the United States and the other parties to such suits as to said court law and equity shall require. The Attorney General shall designate and appoint from the Department of Justice a person who is competent to defend the said Cherokee Nation and the United States. And the said Shawnees, Delawares, and freedmen may be represented by attorneys and counsel. And the court is hereby *authorized to decree the amount of compensation* of such attorneys and counsel fees, *not to exceed ten per centum* of the *amount recovered,* and order the same to be paid to the attorneys and counsel of the said Shawnees, Delawares, and freedmen; *and all judgments for any sum or sums of money which may be ordered or decreed by such court* in favor of the Shawnees, Delawares, or freedmen, and against the Cherokee Nation, *shall be enforced by the said court or courts against the said Cherokee Nation by execution, mandamus, or in any other way which the said court may see fit.*"

Section 1 gave the court jurisdiction "to determine what are the just rights in law or in equity" of the Delaware, Shawnee, and freedmen citizens, as a class, of the Cherokee Nation, and section 2 of said act authorized the institution and prosecution of a suit or suits on behalf of the Delawares, Shawnees, or freedmen, or either of them, "to recover from the Cherokee Nation all moneys due either in law or equity" because of their being excluded from previous per capita payments, or from which they may in the future be excluded,

from the participation and distribution of moneys "derived from the sale, leasing, or rent for grazing purposes on Cherokee lands west of the 96° of west longitude." On December 19, 1891, the Cherokee Nation entered into an agreement with the representatives of the United States to sell the "Cherokee Outlet" (being lands owned by the Cherokee Nation west of the 96° of west longitude), and this agreement was ratified by an act of Congress approved March 3, 1893 (27 Stat., 640), and "a sufficient amount" of money was "retained in the Treasury" to pay the freedmen "such sums as may be determined by the courts of the United States to be due them."

Suit was instituted on behalf of the freedmen in the name of *Moses Whitmire, trustee, vs. The Cherokee Nation and the United States* in the Court of Claims, and a final decree was entered February 3, 1896. This decree defined the rights of freedmen citizens as *a class* to be the same as Cherokees by blood, and awarded a money judgment in the sum of $903,-365, because of their being excluded from per capita payments in 1886, 1890, and 1894. The decree provided for the distribution of the money judgment, but there was a serious contention over the question of how the individual freedmen entitled to participate in the distribution of money should be ascertained. When the first judgment was rendered, on March 4, 1895, the court indicated that it would receive suggestions from counsel on both sides as to how the roll should be made. After having heard testimony, the court, on May 8, 1895, entered a decree making the "Wallace roll" the basis for making the freedmen roll to whom the money judgment should be distributed; but the decree of February 3, 1896, set aside the "Wallace roll" as a basis and three Commissioners were appointed for the purpose of ascertaining and determining who were the individual freedmen entitled to share in the distribution of said sum of $903,365, and the decree directed that they should proceed to the Cherokee Nation and hear all testimony that might be offered for or

against the identity of all freedmen claiming to be entitled to share in the distribution of said money, and to enroll only such as were living on May 3, 1894, the date of the last per capita payment made by the Cherokee Nation, excluding those who had forfeited or abjured their citizenship under the Cherokee constitution and laws; but the Commissioners were further directed not to receive any testimony tending to disprove the right to enrollment of any freedman whose name appeared upon the authenticated Cherokee roll of 1880.

This roll was made under the direction of and approved by the Secretary of the Interior. The roll was completed and reported to the Secretary of the Interior in 1897 (Rec., p. 108), and the entire money judgment of $903,365 was distributed in the spring of 1897, more than eleven years before the filing of this supplemental petition. Petitioners do not claim in their supplemental petition that there have been any per capita payments made by the Cherokee Nation since that time to the exclusion of Cherokee freedmen, nor is there any claim that the Cherokee freedmen *as a class,* recognized and enrolled as citizens of the Cherokee Nation, are being discriminated against. In other words, it is conceded that all recognized and enrolled freedmen are allotted land as other citizens of the Cherokee Nation, and are given the same property rights. Congress had not at that time passed any act providing for the allotment of the lands of the Cherokee Nation; hence the jurisdictional act of October 1, 1890, *supra,* and the act supplemental thereto, only authorized the court to determine the rights of the freedmen *as a class* and to award judgment for their proportionate share of the money paid out per capita to Cherokees by blood to their exclusion.

The real purpose of the supplemental petition filed herein is to have construed by the court acts of Congress passed in 1898, *in* 1902, *and in* 1906, *subsequent to the rendition of the final decree in this case on February* 3, 1896.

Prior to this time no agreement had been reached with the Cherokee tribe for the allotment of their lands, and no act

had been passed by Congress providing for the same. Congress had by the act of March 3, 1893 (27 Stat., 640), appointed a Commission to negotiate with the Five Civilized Tribes for the allotment of their lands, but no agreement had been reached with the Cherokees in 1896.

Congress, by the act of June 10, 1896 (28 Stat., 321), conferred jurisdiction upon the Commission to the Five Civilized Tribes as follows:

> "And said Commission shall also make a roll of freedmen entitled to citizenship in said tribes, and shall include their names in the lists of members to be filed with the Commissioner of Indian Affairs."

And by the act of June 7, 1897 (30 Stat., 83), provided:

> "That the words 'rolls of citizenship,' as used in the act of June tenth, eighteen hundred and ninety-six * * * *shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the Nation,* * * * and any name appearing on such rolls and not confirmed by the act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such Commission."

By section 21 of the act of June 28, 1898, it was, referring to the Commission to the Five Civilized Tribes, provided:

> *"It shall make a roll of Cherokee freedmen in strict compliance with the degree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six."*

And:

> *"The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent."*

And:

> *"No person shall be enrolled who has not heretofore removed to and in good faith settled in the Nation in which he claims citizenship."*

Congress, by the following amendment to the Indian Appropriation bill, approved May 31, 1900 (31 Stat., 221), enacted the following:

> "That said Commission shall continue to exercise all authority heretofore conferred on it by law. But it shall not receive, consider, or make any record of any application of any person for enrollment as a member of any tribe in Indian Territory who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such, *and its refusal of such applications shall be final when approved by the Secretary of the Interior.*"

And by the act of March 3, 1901 (31 Stat., 1073), as follows:

> "*The rolls* made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, *shall be final,* and the persons whose names are found thereon *shall alone constitute* the several tribes which they represent; and the Secretary of the Interior is authorized and directed to fix a time by agreement with said tribes or either of them, for closing said rolls, but upon failure or refusal of said tribes, or any of them, to agree thereto, then the Secretary of the Interior shall fix a time for closing said roll, after which no name shall be added thereto."

The act of July 1, 1902 (32 Stat., 716), after providing, in section 25, that the roll should be made as of date September 1, 1902, by section 27 provided as follows:

> "Such rolls shall in all other respects be made in strict compliance with the provisions of section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight

(Thirtieth Statutes, page four hundred and ninety-five), and the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one)."

By section 3 of the Act of April 26, 1906 (34 Stat., 137), it was provided:

> *"The roll of Cherokee freedmen shall include only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants, who were actual personal bona fide residents of the Cherokee Nation August eleventh, eighteen hundred and sixty-six, or who actually returned and established such residence in the Cherokee Nation on or before February eleventh, eighteen hundred and sixty-seven;* but this provision shall not prevent the enrollment of any person who has heretofore made application to the Commission to the Five Civilized Tribes or its successor and has been adjudged entitled to enrollment by the Secretary of the Interior.
>
> "Lands allotted to freedmen of the Choctaw and Chickasaw tribes shall be considered 'homestead,' and shall be subject to all the provisions of this or any other act of Congress applicable to homesteads of citizens of the Choctaw and Chickasaw tribes."

And section 2 of said act of April 26, 1906, provides:

> *"That the rolls of the tribes affected by this act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date."*

The pertinent parts of all of the above acts and treaties are, for convenient reference, printed as an appendix to this brief.

Assignment of Errors.

1. The Court of Claims erred in holding that the jurisdiction of the Court of Claims conferred by the jurisdictional act of October 1, 1890 (26 Stat., 636), had not been exhausted.

2. The Court of Claims erred in holding that the petitioners had not been guilty of such laches as to prevent their being heard.

3. The Court of Claims erred in holding that Congress intended by enacting section 21 of the act of June 28, 1898 (30 Stat., 495); May 31, 1900 (31 Stat., 221); section 27 of the act of July 1, 1902 (32 Stat., 716), and section 3 of the act of April 26, 1906 (34 Stat., 137), to confirm the Kern-Clifton roll.

4. The Court of Claims erred in not holding that Congress had the power to change the method of making the Cherokee freedman roll, and that Congress intended to make said change by the acts of June 28, 1898, July 1, 1902, and April 26, 1906, *supra*.

5. The Court of Claims erred in not holding that exclusive jurisdiction for the making of the final rolls of the Five Civilized Tribes, including the Cherokee freedman roll, had been conferred upon the Commission to the Five Civilized Tribes, subject only to the final approval of the Secretary of the Interior.

6. The Court of Claims erred in holding that it had jurisdiction to decree the reopening of the Cherokee rolls, including the freedman roll, after the date fixed by section 2 of the act of April 26, 1906, *supra*, for the final approval of all rolls on or before March 4, 1907.

7. The Court of Claims erred in holding that it had jurisdiction to grant injunctive relief in this case.

8. The Court of Claims erred in entering the decree of February 20, 1911 (Rec., p. 235), and in overruling appellants' motion for a new trial June 5, 1911 (Rec., p. 247).

BRIEF AND ARGUMENT.

Jurisdiction of the Court of Claims Attacked.

(1) The jurisdiction of the Court of Claims conferred by the jurisdictional act had been exhausted.

(2) The Court of Claims had no jurisdiction to grant injunctive relief in this case.

The most important question, and the one that always first engages the attention of the court, presents itself in this case, and that is the one of jurisdiction. Had not the jurisdiction of the Court of Claims conferred by the jurisdictional act of October 1, 1890, *supra,* been exhausted? We most earnestly submit that it had. In considering this question let us look:

First, to the purposes of the act and the conditions that prevailed at the time of its passage. The freedmen claiming under the ninth article of the treaty of 1866, as they claimed, had been unconstitutionally excluded along with the Delaware and Shawnee citizens of the Cherokee Nation from participation in the per capita payments made by the Cherokee Nation to Cherokees by blood. The immediate object sought to be accomplished was to recover a money judgment, and the second object was to determine what rights freedmen *as a class* had claiming under the treaty of 1866.

The court awarded a money judgment of $903,365 and ordered a roll made under the direction of the Secretary of the Interior for *the distribution of this money judgment.* This roll was made in 1896 and the money was all distributed. None of the money judgment remains. No action of this court is sought as to that.

The Court of Claims in its opinion in this case (30 C. Cls., 180) said:

> "This is not an action to recover damages in the nature of a suit at law, nor is it a proceeding in equity to wind up and dispose of the affairs and assets of a partnership. *It is simply a suit in equity, brought by the equitable owners of a specific fund to recover their proportionate share in the same.* The jurisdictional act recognizes this principle, for it authorizes suits to be brought for the proportionate shares of the parties in funds derived from the sales or leasing of lands of the Cherokee Nation. The court cannot go beyond this if it would," * * *

which clearly shows that it was *not intended* by the decree afterwards entered that it should *cause a roll to be made for the partition of the land.*

By the decree of February 3, 1896, the Court of Claims directed the Secretary of the Interior to appoint three Commissioners to make up the roll upon which the money judgment was to be distributed. On April 14 counsel for the Cherokee freedmen presented a petition to the Court of Claims, asking that certain instructions be given the Commissioners appointed by the Secretary of the Interior. This motion was overruled by the court upon the ground *that the Secretary of the Interior had exclusive jurisdiction,* and declined to instruct the Commissioners appointed by the Secretary, in the following language:

> "The court is of the opinion that the act 2d March, 1895 (28 Stat. L., p. 910, sec. 1121), prescribed the manner in which payments per capita shall be made,

and that the matter of payment is exclusively within the jurisdiction of the Secretary of the Interior.

"The court after further consideration, adheres to the opinion communicated to the Commissioner of Indian Affairs, February 18, 1896.

"The within motion for instructions is overruled" (31 C. Cls., 148).

By referring to the act of March 2, 1895, *supra,* it will be seen that it authorized the Secretary of the Interior to make rolls for the distribution of money, and by referring to this act it is clear that the court then construed that it gave the Secretary of the Interior *exclusive jurisdiction.* If that be true, then the Secretary of the Interior was not the agent of the court, never reported the roll to the court for approval, and it therefore never became a "court's roll."

Upon a motion made to enlarge the per capita shares in the case of *Journeycake vs. The Cherokee Nation, etc.* (30 C. Cls., 174), brought under the same jurisdictional act, the court overruled the motion and held:

> "No new issues, either of *law or fact,* can be determined by the court upon a motion of this kind. If there is to be *a new decision,* there must be *a new petition, a new trial, a new decree,* and with it, for the defendants, *a new right of appeal.*"

To make ourselves perfectly clear, our contention is that the Court of Claims, by the act of October 1, 1890, *supra,* was given jurisdiction to define the rights of persons claiming as Cherokee freedmen *as a class,* and to award a money judgment. In other words, to determine the constitutional questions involved and leave to the Secretary of the Interior the identification of the individuals and the distribution of the money judgment. The Court of Claims so held in the case of *Journeycake, Blackfeather, and Moses Whitmire, trustee, vs. The Cherokee Nation* (31 C. Cls., 143), where the court was considering certain supplemental petitions in all three cases, in the following language:

> "He (the Secretary of the Interior) is charged by law with the duty of ascertaining their individual identity, of determining who are Delawares and who are Shawnees, and of maintaining their treaty rights. The question of identity of individuals entitled to the benefit of a treaty being in its nature political and within the Secretary's official jurisdiction, the court would adopt his determination if the complainants were to be named individually in the decree."

It will be observed from the above quotation that the Court of Claims, under the same jurisdictional act, held that the Secretary was "charged by law with the duty of ascertaining their individual identity," evidently referring to the act of March 2, 1895, *supra*. This the Court of Claims held when a motion for instructions was presented to the court on April 15, 1896, holding that the Secretary of the Interior had exclusive jurisdiction over the matter of making the roll.

By the act of June 10, 1896, *supra*, the Commission was authorized to hear and determine applications for the enrollment of citizens of the Five Civilized Tribes, and an appeal was authorized to be taken from the decision of the Commission to the United States courts in the Indian Territory. Many applicants were admitted and a great many rejected. Subsequently, by act of July 1, 1898 (30 Stat., 591), an appeal was authorized to the Supreme Court of the United States. Under this act appeals were prayed on behalf of a great number of applicants and on behalf of the nations as well. These appeals were consolidated and tried as one case, known as the *Stephens case* (174 U. S., 445). The court in that case reviewed the citizenship legislation enacted up to that time, held that it was constitutional, and affirmed the judgments of the lower courts under which many applicants were enrolled. Congress, by subsequent legislation, authorized the reinvestigation of these cases, and the constitutionality of this subsequent legislation was called in question in the case of *Wallace vs. Adams*, appealed to

the Supreme Court (204 U. S., 415). In that case the Supreme Court held that only constitutional questions were intended to be decided in the *Stephens case, supra,* and not the rights of individuals, as follows:

> "While sustaining the act authorizing such review, and providing for appeals to this court, we construe it as limiting the appeals to the question of the constitutionality or validity of the legislation, and not as bringing before us the facts in the instances of all applications for citizenship.

And again, on page 423, the court said:

> "While the act of July 1, 1898, provided for an appeal to this court, and appeals were taken in many cases, yet our inquiry stopped with the question of the constitutionality of the legislation. In other words, we entertained and decided a purely judicial question of the validity of the means Congress had adopted for determining the matter of citizenship. *We did not attempt to pass upon the question of citizenship in any particular case, nor to determine whether the applicant was or was not entitled to be enrolled as a citizen."*

Cherokee Intermarriage Case.

That is our contention here. We are sustained in this view by the decision of the Court of Claims (40 C. Cls., 411), and of this court (203 U. S., 76), in the Cherokee intermarriage case. In that case the constitutional and legal questions were decided, and the rights of persons claiming citizenship by intermarriage in the Cherokee Nation, *as a class,* were determined. The right to enrollment of no individual was passed upon. That was left to the Secretary of the Interior.

Only Rights of Cherokee Freedmen as a Class, Not as Individuals, Determined by Decree of February 3, 1896.

The jurisdictional act of October 1, 1890, *supra,* under which this original suit was instituted in the Court of Claims, provided for the institution of like suits on behalf of the Shawnee and Delaware Indian citizens of the Cherokee Nation. Suit was instituted on behalf of the Delaware Indians and their rights *as a class* determined by this court in the case of *The Cherokee Nation vs. Journeycake* (155 U. S., 196), *but the right of no individual was determined.* Soon after the final judgment a roll was made and the money judgment distributed. After the act of June 28, 1898, providing for the making of a final roll of citizens for allotment purposes a new roll was made of the Delaware Indian citizens of the Cherokee Nation in the same manner that the present freedmen roll was made.

The same is true of the Shawnee Indian citizens of the Cherokee Nation. Their rights *as a class* were determined in the case of *The Cherokee Nation vs. Blackfeather* (155 U. S., 218), *but the right of no individual was determined.* The money judgment awarded the Shawnees was disbursed upon a roll made by the Secretary of the Interior, and after the act of June 28, 1898, was passed a new roll of the Shawnee Indian citizens of the Cherokee Nation was made for enrollment purposes by the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior, in the same manner that the present freedmen roll was made.

As above stated, this court in the Cherokee Intermarriage case (203 U. S., 76) determined the rights of those claiming citizenship in the Cherokee Nation by intermarriage, but the right of no individual was determined.

This court has never, in any Indian case, attempted to determine the right of any individual citizen where the

rights of a class only were involved, and it was not the purpose of Congress, in passing the jurisdictional act of October 1, 1890, to have the individual rights of any person claiming as a Delaware, Shawnee or freedman citizen of the Cherokee Nation determined.

Blackfeather vs. The United States, Decisive (190 U. S., 368).

The court in the case of Blackfeather *vs.* The United States (190 U. S., 368) analyzes the jurisdictional act of October 1, 1890, in an elaborate opinion and holds, as we have contended here, that section 1 only intended to determine the rights of the Delawares, Shawnees, and Freedmen as a class and not as individuals; and the court also held that individual claims could not be determined under the jurisdictional act. This is what we contend in this case, that only rights of the Freedmen as a class were intended to be determined by section 1, and that the remainder only authorized the bringing of a suit to determine their right to certain per capita moneys theretofore distributed to their exclusion, but no rights of individuals. In this proceeding the right of individuals to be enrolled and not the rights of Freedmen as a class is to be determined.

sioners appointed by him. We respectfully submit that if the Court of Claims would not assume jurisdiction to instruct the commissioners appointed by the Secretary how to make the rolls in 1896, that it should not assume jurisdiction now to instruct the Secretary of the Interior to make a roll for an entirely different purpose. We are further confirmed in our opinion by the following quotation from the court in this same case (31 C. Cls., 144), where the court said:

> "The United States, when they passed the jurisdictional act, were interested only in making sure

> that the Indians and freedmen should be protected in their treaty rights to their distributive shares in the funds referred to. *When the court awards those distributive shares its authority ends.*"

In this case a money judgment was awarded the freedmen, the same was distributed, and with it we insist, in the language of the court, *"its authority ends."*

As above stated, the Court of Claims refused to entertain supplemental petitions in this case, where either a new issue of law or fact was involved. In the case of *Journeycake vs. The Cherokee Nation* (30 C. Cls., 174), a supplemental petition was filed to change the amount awarded *per capita* by the decree, so that each complainant would be awarded the same amount that was by distribution paid to each Cherokee.

The court said:

> "Whether the facts will justify the court in changing the basis of the recovery is a new issue of fact. Whether the jurisdictional act will authorize the court to award to the complainants a larger proportion of the funds than they were legally entitled to is *a new question of law.*"

In the same opinion, near the bottom of page 176, in declining to change the basis of enumeration, the court put it upon the ground that it would be trying a *new issue of fact* in the following language:

> "If there was an under enumeration of them before, there may have been an under enumeration of others, and determining this will be trying a new issue of fact."

In the same opinion, on page 177, the complainants asked to have the decree amended by inserting a recovery for interest on the several sums awarded, which was denied by the court on the ground that it would be a *new question of law.*

It will be seen, therefore, that in each supplemental petition filed, either on behalf of the Delawares, the Shawnees,

or the freedmen, under the jurisdictional act of October 1, 1890, *supra*, the Court of Claims consistently and repeatedly refused to assume jurisdiction *where any new issue of law or fact was involved.*

Petitioners seek by this supplemental petition to have construed by the court section 21 of the act of June 28, 1898, section 27 of the act of July 1, 1902, and section 3 of the act of April 26, 1906, *supra*, but we insist that the court had no jurisdiction; that the jurisdictional act of October 1, 1890, *supra*, under which the original suit was instituted, did not authorize the court to *construe legislation* enacted by Congress subsequent thereto and since the final decree was entered. *We submit that the test is, Can the court now pass upon the matters presented in the supplemental petition of claimants without construing the above acts enacted subsequent to the entering of the final decree on February* 3, 1896?

The decree itself shows that the purpose of making the roll was for the distribution of the money judgment, for it provides:

> "And it is further ordered and adjudged that for the purpose of ascertaining and determining *who are the individual freedmen of the Cherokee Nation now entitled to share in the distribution of the said sum of* $903,365, the Secretary of the Interior be authorized to appoint three commissioners, one on the nomination of the complainant and one on the nomination of the defendant, the Cherokee Nation, but both nominations to be approved by him, to proceed to the Cherokee country and hear the testimony both for and against the identity of all freedmen, free colored persons, and their descendants, claiming to be entitled to share in the distribution of said $903,365, that may be offered by the respective parties to this suit."

The Court of Claims stated in the same opinion (p. 188):

> "It is simply a suit in equity, brought by the equitable owners of a specific fund to recover their

proportionate share in the same. The jurisdictional act recognizes this principle where it authorizes suit to be brought for the proportionate shares of the parties in funds derived from the sales or leasing of lands of the Cherokee Nation."

This shows that the roll to be made was for the distribution of the money judgment. However, near the bottom of page 188 in the same opinion the court directed the Wallace roll to be further corrected by bringing it down to May 3, 1894:

> *"So that when thus amended and changed it should represent the freedmen entitled to participate in the distribution of the fund now awarded to the complainant."*

Unquestionably this clearly shows that the purpose for which the roll was to be made was for the "distribution of the fund now awarded to the complainant." In other words, *it was not a roll for the future allotment of lands in the Cherokee Nation.* No allotment act had then been passed by Congress, and therefore no roll was necessary for that purpose at that time.

The attention of the court is also called to the fact that the fee allowed by the Court of Claims to counsel for complainant was allowed as a percentum of the money judgment, which indicates that the court only had in mind the money judgment awarded complainant at that time.

The instructions of the secretary to the Kern-Clifton commission February 20, 1896 (Rec., p. 61-64), directs them "to submit a schedule of the names of the persons determined by you as being entitled to share in the distribution of the fund of $903,365."

In the matter of the supplemental petition filed on behalf of Ella Fletcher Bartholow in the case of *Journeycake vs. The Cherokee Nation* (No. 16837), in the Court of Claims asking for additional compensation as administratrix of the estate of her deceased father, who was the attorney of record

for the Delaware Indians in that case, alleging that by reason of the services of her deceased father the Delaware Indians had been allotted lands in the Cherokee Nation, and therefore entitled to additional compensation, the court, in a memorandum decision, denied the petition on December 6, 1909, upon the ground that the court was without jurisdiction.

In passing upon the purpose of making the Kern-Clifton roll in 1896, Judge C. W. Raymond, judge of the United States District Court for the Northern District of the Indian Territory, in an application for an injunction against the Commission to the Five Civilized Tribes in the making of the Cherokee freedmen roll in 1903, held that the purpose of making the Kern-Clifton roll in 1896 was for the distribution of the money judgment, in the following language:

> "The common property of the Cherokee Nation is now about to be divided. It would seem that this Commission appointed by the Secretary of the Interior was for the purpose only of fixing a basis for the payment of the $903,365, *and not as a basis for division of the public lands of the nation.*"
> (Decision of Judge Raymond in the case of *Buffington et al. vs. Commission to the Five Civilized Tribes et al.*, reported in Annual Report of the Department of the Interior, 1904, Indian Affairs, part 2, p. 161.)

When the jurisdictional act of October 1, 1890, *supra*, was passed there was no thought of the allotment of the lands of the Cherokee Nation. The Commission to the Five Civilized Tribes was not authorized until March 3, 1893, three years thereafter, and when the decree was rendered February 3, 1896, no agreement had been entered into with the Cherokees and no act was passed by Congress for the allotment of their lands. We submit, therefore, that the court could not have had that in mind when the decree was entered.

The Decree of February 3, 1896, Not Attacked—Only the Roll Made in Disregard of It.

The Cherokee Nation is not attacking the decree of the Court of Claims entered February 3, 1896. It is accepted, so far as this case is concerned, as a correct interpretation of the treaty rights of freedmen *as a class*. It has never been attacked, either by the nation or the Government of the United States. It was the Kern-Clifton roll made in disregard of the decree, in violation of its positive direction, that has been the subject of continuous attack since 1898. The roll was not approved by the Court of Claims, was not a part of the decree, not in existence on February 3, 1896, but was approved by the Secretary of the Interior January 18, 1897, without having been submitted to the Cherokee Nation (Rec., p. 108).

The Court of Claims Had No Jurisdiction to Grant Injunctive Relief in This Case.

A critical examination of the original jurisdictional act (26 Stat., 636) discloses that jurisdiction was never conferred upon the Court of Claims to enforce anything but a money judgment.

Section 1 of the jurisdictional act of October 1, 1890, provides for the institution of a suit by the Delawares, Shawnees, and freedmen in the Court of Claims, with the right of appeal to the Supreme Court, and the court is authorized—

> "to hear and determine what are the just rights in law or in equity of the Shawnee and Delaware Indians: * * * and also the Cherokee freedmen * * * in respect to the subject matter hereinabove provided for."

Section 2 provides for the bringing of a suit or suits on

behalf of the Shawnees, Delawares, or freedmen against the Cherokee Nation and the United States—

> "to recover from the Cherokee Nation all moneys due either in law or equity and unpaid, to the said Shawnees, Delawares, or freedmen * * * derived from the sale, leasing or rent for grazing purposes on lands west of 96° west longitude, and which have been or may be appropriated and directed to be paid out per capita by the acts passed by the Cherokee Council, and for all moneys, lands and rights which shall appear to be due to the said Shawnees, Delawares, or freedmen under the provisions of the aforesaid articles of the treaty and articles of agreement."

Section 3 defines the procedure, time of bringing the suit, how it shall be defended, how service may be had, and how the fees of counsel for petitioners are to be allowed and paid, and further provides:

> "and all judgments for any sum or sums of money which may be ordered or decreed by such court in favor of the Shawnees, Delawares, or freedmen, and against the Cherokee Nation, shall be enforced by the said court or courts against the said Cherokee Nation by execution, mandamus, or in any other way which the court may see fit."

Section 4 authorizes the Shawnees to bring a suit against the Government of the United States, and has no bearing upon this case.

The decision of the court in the case of the *United States vs. Jones* (131 U. S., 1) directly holds that the Court of Claims under its general jurisdiction has no authority to enter a decree for the enforcement of any judgment, except only for "money decrees and money judgments." After quoting the various provisions of the statutes conferring general jurisdiction upon the Court of Claims and the district and circuit courts, the court said:

> "These provisions undoubtedly include the Court of Claims as well as the district and circuit courts.

> So in relation to the interest, section 10 declares that 'from the date of such final judgment or decree interest shall be paid thereon at the rate of four per centum per annum until the time when an appropriation is made for the payment of the judgment or decree.' It seems, therefore, that in point of providing only for money decrees and money judgments, the law is unchanged, merely being so extended as to include claims for money arising out of equitable and maritime as well as legal payments. We do not think that it was the intention of Congress to go further than this. Had it been, some provision would have been made for carrying into execution decrees for specific performance or for delivering the possession of property recovered in kind. The general scope and purport of the act is against any further extension than that here indicated. The expression in the fifth section referring to 'money or other thing claimed, or the damages sought to be recovered' on which so much reliance is placed by the appellees cannot outweigh the considerations referred to and tending to introduce entirely new fields of jurisdiction."

This decision was rendered May 13, 1889, only a short time before the enactment of the jurisdictional act of October 1, 1890.

Finding that the Court of Claims has no general jurisdiction to pass the decree prayed for to compel the Secretary of the Interior to enroll petitioners for the allotment of land, let us now examine the jurisdictional act. Section 1 only authorized the court to "determine" the rights of freedmen *as a class*, not to grant relief by injunction or mandamus. The only authority given the court to enforce its judgment was conferred by section 3, and that was to enforce its money judgment, by the following language:

> "And *all judgments for any sum or sums of money* which may be ordered or decreed by such court in favor of the Shawnees, Delawares, or freedmen and against the Cherokee Nation *shall be enforced by*

> *the said court or courts against the said Cherokee Nation* by execution, mandamus, or in any other way which the court may see fit."

It has been our contention from the beginning that the court was only given jurisdiction—

(1) To determine the rights of the freedmen *as a class*—to construe the treaty of 1866, under which they acquired rights, if any, and the constitution and laws of the Cherokee Nation, and not to determine the right of any individual.

(2) To award a money judgment. This money judgment could be enforced by any proper decree of the court as against the Cherokee Nation, but the court was not authorized to enforce any judgment against the United States.

Both have been done. The Court of Claims defined the rights of the freedmen as a class, and the money judgment has been disbursed. Both having been done, we respectfully submit, in the language of the Court of Claims in this case (31 C. Cls., 145):

> "When the court awards these distributive shares its authority ends."

Petitioners Guilty of Laches.

The Court of Claims was inadvertently, by the erroneous statement in the supplemental petition and the oral statement of counsel for petitioners, led into the error of stating in its opinion—

> "There is nothing to show that the Kern-Clifton roll was ever questioned until the supplemental petition had been filed herein."

The records show that the supplemental petition was filed on May 6, 1908 (Rec., p. 48). Counsel for petitioners stated and restated that the Kern-Clifton roll was never questioned;

hence it is extremely important that we invite the careful attention of the court to the facts with reference to it. In order to refute the erroneous statements made to the court and for ready and convenience reference we have caused to be printed as part of the record in this case as "evidence of defendants" certain debates in Congress, opinions of the Assistant Attorney General for the Interior Department, instructions to the Commission to the Five Civilized Tribes, and the decisions of the Commission to the Five Civilized Tribes, with the approval of the Secretary of the Interior, all of which conclusively show that the Kern-Clifton roll was disregarded and repudiated since 1898. When the act of June 28, 1898, was pending in the Senate of the United States an amendment was offered to confirm the Kern-Clifton roll, and this was rejected upon the protest of the Cherokee delegation (Rec., p. 68).

On November 23, 1899, the Interior Department instructed the Commission to the Five Civilized Tribes in the making of the freedmen roll, and it was instructed to disregard the Kern-Clifton roll.

On May 11, 1900 (Rec., p. 70), the instructions of November 23, 1899, were modified by other instructions of the Secretary of the Interior, prepared and approved by Assistant Attorney General Van Devanter, now Justice of the Supreme Court of the United States, and in those instructions the Commission to the Five Civilized Tribes was directed to disregard the Kern-Clifton roll in the following language:

> "A roll was made under this decree (referring to the decree of February 3, 1896), known as the 'Clifton roll,' which was approved by this Department in 1897. It was claimed that said roll contains many names not properly belonging there, but whether this fact influenced Congress to disregard that roll and direct that a new one be made in strict compliance with said decree, is immaterial, for the fact remains that the decree alone is to be taken as a guide for making the roll which your Commission has to prepare" (Rec., p. 72).

Clearly, this was a direct instruction by the Assistant Attorney General to *disregard* the Kern-Clifton roll on May 11, 1900.

The Commission to the Five Civilized Tribes began making the roll on May 11, 1900, but the work was suspended until July 9, and thereafter the reception of applications for the enrollment of freedmen was deferred until the spring of 1901 (Rec., p. 82), when applications of freedmen were received and a large amount of testimony taken in each case (Rec., p. 83) under the instructions of May 11, 1900, which were published as a public document in the report of the Commission to the Five Civilized Tribes ending June 30, 1901, and therefore publicly known.

Congress, by section 27 of the act of July 1, 1902 (32 Stat., 716), after providing that the roll should be made as of September 1, 1902, directed that it should, in all other respects, be made in accordance with section 21 of the act of June 28, 1898, and the act of May 31, 1900. At the time of the passage of this act Congress knew of the construction placed upon section 21 of the act of June 28, 1898, by the Assistant Attorney General, by the Commission to the Five Civilized Tribes, and the Secretary of the Interior, and, of course, intended to adopt the construction placed upon that act. The report of the Commission to the Five Civilized Tribes for the year ending June 30, 1903 (Rec., p. 88), states that the Commission addressed itself in September, 1902, to the preparation of decisions in doubtful freedmen cases, and that the rights of that class had been vigorously contested, and it further states:

> "The attorneys for the applicants and for the Cherokee Nation, in addition to submitting briefs, desired to present their views in oral arguments before the Commission. Their wishes in this respect were granted, and the law clerks charged with the preparation of the cases for decision were also given an opportunity to hear the arguments of counsel, which developed a broad divergency of view. The attorneys for the Cherokee Nation contended that

only those freedmen whose names were found on the 1880 roll and their descendants were entitled to enrollment, while counsel for the applicants claimed that nothing short of the enrollment of those whose names appeared on the Kern-Clifton roll of 1897 and their descendants could be called a strict compliance with the decree of the Court of Claims in the case of *Moses Whitmire vs. Cherokee Nation.*

"Both theories were pressed with vigor. The Commission, in receiving applications and classifying freedmen applicants, *has been guided by the instructions of the Secretary of the Interior, as contained in his letter of May* 11, 1900. As the views of both the attorneys for the Cherokee Nation and for the applicants were at variance with the departmental view, it was deemed advisable to prepare a test case for submission to the Secretary of the Interior. The consolidated case of Henry C. Hayden *et al.* (Cherokee Freedmen D., 498) was selected for this purpose, as involving the most important questions arising in this class of applications. One of the applicants claimed citizenship by intermarriage. In September, 1902, the Commission rendered its decision therein, denying the applications on the ground that the applicants had not complied with the provisions of the treaty of 1866. The decision, together with briefs submitted by counsel for both parties, was forwarded to the Secretary of the Interior for his consideration. The Department approved this decision."

The principal applicant in this case, Maria Hayden, wife of Henry C. Hayden, was enrolled upon the Kern-Clifton roll, and the decision of the Commission in the case of Henry C. Hayden *et al.*, with the action of the Department thereon, is found in the "evidence for defendants" (Rec., p. 146). Here was a public decision of a test case, involving a question decided adverse to the contention of the petitioners and approved by the Secretary of the Interior.

In the case of Mary Ann Riley, the Assistant Attorney General for the Interior Department, on August 31, 1905 (Rec., p. 75), rendered an opinion holding that the Kern-

Clifton roll was not binding, and that the Commission to the Five Civilized Tribes should go behind the roll and ascertain whether or not the freedman applicant was entitled to be enrolled under the decree of the Court of Claims. This was a *repudiation* of the Kern-Clifton roll by a law officer of the Government.

Section 3 of the act of April 26, 1906 (34 Stat., 137), provides:

> "The roll of Cherokee freedmen shall include only such persons of African descent, either free colored persons or the slaves of Cherokee citizens and their descendants, who were actual, personal, bona fide residents of the Cherokee Nation August 11, 1866, or who actually returned and established such residence in the Cherokee Nation on or before February 11, 1867."

If the Kern-Clifton roll was to be binding, why did Congress require the Commission to investigate each particular case to see whether or not a freedman applicant returned on or before February 11, 1867? If that question had already been determined by the Kern-Clifton Commission, and if it was *res judicata*, why should Congress provide again for its determination? Congress knew, by the public acts of the Commission to the Five Civilized Tribes and the Secretary of the Interior, the opinion of Assistant Attorney General Van Devanter in 1900, and of the Assistant Attorney General in the Riley case in 1905, that the Kern-Clifton roll was disregarded, and when the act of 1906 was passed the reports of the Commission to the Five Civilized Tribes filed as evidence in this case show that most of the decisions had already then been rendered in freedmen cases and that the Kern-Clifton roll was disregarded.

We respectfully submit that the Kern-Clifton roll was disregarded—

(1) By the rejection by the Senate of the amendment to the act of 1898 confirming the Kern-Clifton roll.

(2) By the instructions of the Interior Department on November 23, 1899, to the Commission to the Five Civilized Tribes.

(3) By the instructions of Assistant Attorney General Van Devanter, approved May 11, 1900.

(4) By the disregard by the Commission of the Kern-Clifton roll in all freedmen cases, including the *Henry C. Hayden test case.*

(5) By the decision of the Assistant Attorney General in the *Mary Ann Riley case,* August 31, 1905.

(6) By Congress, in the enactment of section 3 of the act of April 26, 1906.

Petitioners began to apply for enrollment on May 11, 1900, and continued to have their cases adjudicated until March 4, 1907. They and their attorneys were aware of all of the decisions of the officers of the Government, hereinabove enumerated, and of the acts of Congress setting aside and disregarding the Kern-Clifton roll, and they also were aware of the provision in section 2 of the act of April 26, 1906, providing that the rolls should be fully completed on or before March 4, 1907, and that the Secretary of the Interior should have no jurisdiction to approve the enrollment of any person after that date, yet no supplemental petition was filed in the Court of Claims during all of that time to compel the Secretary of the Interior, while he yet had jurisdiction over enrollment matters, as is now asked to be done, to make the Cherokee freedmen roll, using the Kern-Clifton roll as a basis. This supplemental petition was filed on May 6, 1908. We respectfully submit that it was filed too late, under the decision of the Supreme Court of the United States in the case of "The Eastern Cherokees, Petitioners, No. 15, Original" (220 U. S., 83), wherein the court held

that the Court of Claims, having made an order deciding the principle upon which the Eastern Cherokee roll was to be made on April 28, 1907, that the petitioners were guilty of laches by waiting until after the roll was made and approved, and by not praying an appeal or applying for a writ of mandamus to correct the decision of the court rendered on April 28, 1907, deciding the principle upon which the roll should be made. In this case we insist that petitioners knew, from the rejection of the amendment to the act of 1898 by the Senate which would have confirmed the Kern-Clifton roll; by the decision of Assistant Attorney General Van Devanter, approving the instructions of the Department on May 11, 1900, directing the Commission to disregard the Kern-Clifton roll in making the freedmen roll; by the decision of the Department in the *Henry C. Hayden case;* by the decision of the Assistant Attorney General in the *Mary Ann Riley case;* by the decisions of the Commission to the Five Civilized Tribes, approved by the Department in each of their individual cases; and by the enactment of section 3 of the act of April 26, 1906, that the Kern-Clifton roll was being disregarded, and they also knew by the enactment of section 2 of the act of April 26, 1906, that the roll was to be *"fully completed"* on or before March 4, 1907, and that no one would have jurisdiction to add any name to or take any name from such roll after that date, and that they were therefore guilty of laches in not filing this supplemental petition until May 6, 1908.

New Act Necessary for the Delawares.

The Delaware citizens of the Cherokee Nation brought a similar suit under the same jurisdictional act, and their rights *as a class* were determined and a money judgment awarded and disbursed under the direction of the Secretary of the Interior (28 C. Cls., 320; 30 C. Cls., 172). When the Delawares desired to institute another suit against the Cher-

okee Nation they applied for and secured the enactment by Congress of another jurisdictional act to confer jurisdiction upon the same court. Section 25 of the act of June 28, 1898 (30 Stat., 495), provided:

> "That the Delaware Indians residing in the Cherokee Nation are hereby authorized and empowered to bring suit in the Court of Claims of the United States, within sixty days after the passage of this act, against the Cherokee Nation, for the purpose of determining the rights of said Delaware Indians in and to the lands and funds of said nation under their contract and agreement with the Cherokee Nation dated April eighth, eighteen hundred and sixty-seven; or the Cherokee Nation may bring a like suit against said Delaware Indians; and jurisdiction is conferred on said court to adjudicate and fully determine the same, with right of appeal to either party to the Supreme Court of the United States."

This is an admission by all parties—the Delawares, the Cherokee Nation, and by Congress—that the jurisdiction of the court under the original act of October 1, 1890, was exhausted, and that a new jurisdictional act was necessary. The last *Delaware case* is reported in 38 C. Cls., 172, and 193 U. S., 127, and there was no suggestion that the Court of Claims retained any jurisdiction under the first jurisdictional act.

The Court of Claims in this case observes that it was unnecessary to pass the second jurisdictional act in order to give the court jurisdiction to determine the rights of registered Delawares, as it did in 193 U. S., 127, for the reason "it (the question) might have been decided in the first case without exceeding the jurisdiction conferred by the act of 1890." The original jurisdictional act of October 1, 1890, *supra*, may have been broad enough to have determined the question, but at that time it was only a moot question, because no provision had been made by law for the allotment of Cherokee lands, and this court recently held in the

case of *Muskrat and Dick vs. United States* (219 U. S., 346), that Congress could not refer constitutional questions to the Court of Claims with the right of appeal to the Supreme Court for decision where no real controversy was involved. When the original Delaware suit was decided by this court (155 U. S., 196) upon appeal from the Court of Claims under the jurisdictional act of October 1, 1890, what rights the Delawares had in and to the lands east of 96° west longitude was unquestionably a moot question. The same was true of the rights of Cherokee freedmen in and to the lands east of 96° west longitude when the decree of February 3, 1896, was rendered. No lands were then about to be allotted. Their rights to those lands at that time was a moot question.

The Pam-To-Pee Case Distinguished.

The petitioners in this case rely wholly upon the *Pam-To-Pee case* (187 U. S., 371). This is not a parallel case, nor one in point, because in that case some of the original claimants contended that they were entitled to share in the money judgment awarded, from which they were excluded. The court held that they could not grant the relief prayed for, because the fund had been disbursed. In our case the money judgment was disbursed, and, as we have shown, the roll was made for the distribution of the money judgment and nothing else. There would have been no necessity for making the roll at that time, except for the distribution of the money judgment, because at that time no legislation had been enacted providing for the individualization of the lands and tribal moneys of the Cherokee Nation.

If those freedmen enrolled on the Cherokee authenticated roll of 1880, and their descendants who were alive and had not forfeited or abjured their citizenship, who were omitted from the Kern-Clifton roll, and therefore did not participate in the distribution of the money judgment awarded by the

decree of February 3, 1896, had petitioned the court by supplemental petition to grant them relief, then the case would have been the same as the *Pam-To-Pee case.*

In the *Pam-To-Pee case* it will be remembered that a money judgment was rendered only, and no other rights sought to be determined.

We submit, therefore, that the jurisdiction of the Court of Claims is exhausted:

1. Because it only attempted to define the rights of the freedmen *as a class.*

2. It awarded a money judgment of $903,365, and directed the Secretary of the Interior to make a roll of those entitled to share in this money judgment, and this roll was made and the money paid.

3. The *exclusive jurisdiction* for the making of said roll was acknowledged to be in the Secretary of the Interior.

4. At the time of the passage of the jurisdictional act, and at the time the decree was entered, no provision had been made for the allotment of the lands of the Cherokee Nation.

5. The court can not now entertain the supplemental petition and reopen the decree *without passing upon new legislation subsequently enacted by Congress.*

6. When the decree of February 3, 1896, was rendered by the Court of Claims the question of the rights of freedmen in and to the land east of 96° west longitude was a moot question.

7. The petitioners are guilty of laches.

8. The Court of Claims has no jurisdiction to grant injunctive relief except to enforce a money judgment, and that in this case has been disbursed.

Did Congress Intend by Enacting Sections 21 of the Act of June 28, 1898 (30 Stat., 495), 27 of the Act of July 1, 1902 (32 Stat., 716), and 3 of the Act of April 26, 1906 (34 Stat., 137), to Confirm the Kern-Clifton Roll?

Should this court determine that the jurisdiction of the Court of Claims under the act of October 1, 1890, was not exhausted, that it had authority to construe subsequent legislation enacted by Congress, and also that petitioners were not guilty of laches, then the next most important question for the court to determine is, Did Congress intend by enacting section 21 of the act of June 28, 1898, section 27 of the act of July 1, 1902, and section 3 of the act of April 26, 1906, *supra*, to confirm the Kern-Clifton roll?

First, let us examine the legislation enacted by Congress; and

Second, the reasons why we insist that Congress did not intend to confirm the Kern-Clifton roll.

History of Citizenship Legislation.

The Commission to the Five Civilized Tribes had been appointed under the act of March 3, 1893 (27 Stat., 640), and was given jurisdiction to hear and determine all applications for citizenship, including freedmen, by the act of June 10, 1896 (29 Stat., 321). This work caused them to familiarize themselves with citizenship conditions in the Five Civilized Tribes. Under it the Commission was directed to "make a roll of freedmen entitled to citizenship in said tribes, and shall include their names in the lists of members to be filed with the Commissioner of Indian Affairs."

Under the above act the Commission began to examine into the question of citizenship of the Five Civilized Tribes, and annual reports were made, through the Secretary of the Interior, to Congress.

Act of June 28, 1898 (30 Stat., 495).

It is shown in the *Stephens case* (174 U. S., 445) that the act of June 28, 1898 (Stat., 495), was enacted upon the reports of the Commission to the Five Civilized Tribes and the Senate committee, and section 21 of said act instructed the Commission how the roll of citizens, exclusive of freedmen, should be made, and then directed the Commission how to make the freedmen roll, as follows:

> "It shall make a roll of Cherokee freedmen in *strict compliance* with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six."

It will be noticed that the Commission was directed to make the freedmen roll in *"strict compliance"* with the decree of the Court of Claims. It is well known as a matter of legislative history that the act of June 28, 1898, *supra,* was drafted by the members of the Commission to the Five Civilized Tribes, and that they attended the various sessions of Congress from the time they were appointed under the act of March 3, 1893, *supra,* and remained in attendance upon the Indian committees of Congress to advise them as to conditions among the Five Civilized Tribes, and to suggest remedies and to assist in the drafting of necessary legislation. The Commission had been investigating the question of citizenship for two years when the act of 1898 was passed, and particularly had they been inquiring into the question of citizenship since the act of June 10, 1896, *supra,* which made it a part of their duty to hear and determine applications for citizenship in the Five Civilized Tribes, and to make a roll of freedmen as well.

After their investigation and report the Commission was directed to make the Cherokee freedmen roll in *"strict compliance"* with the decree of the Court of Claims of date February 3, 1896. Why was the word *"strict"* inserted in the

provision instructing the Commission how to make the freedmen roll? There must have been some reason for the use of it. It must have been, and was, inserted upon the recommendation of the Commission; and if so, it must have been because their investigation showed that the Kern-Clifton roll *had not been made in strict compliance* with said decree. The roll since made, after seven years' investigation, began May 11, 1900, and closed March 4, 1907, does not contain the names of all enrolled upon the Kern-Clifton roll, but does contain the names of others omitted from the Kern-Clifton roll, whose names were found upon the Cherokee authenticated roll of 1880, and this shows that the fears of the Commission, reported to Congress in 1898, resulting in the passage of the act of June 28, 1898, *supra,* were justified.

The report of the Secretary of the Interior (Rec., p. 67) shows that the Kern-Clifton Commission *disregarded their instructions and ignored the decree of the court,* and refused to enroll a large number of freedmen whose names were on the authenticated roll of 1880. Of that number 174 were yet living on September 1, 1902, and, allowing a reasonable estimate for those who died after they were refused by the Kern-Clifton Commission, and prior to September 1, 1902, the number would be increased to more than 200 of those whose names were on the authenticated roll of 1880, together with their descendants, numbering at least 100 more, omitted from the Kern-Clifton roll. Instead of enrolling those directed to be enrolled, the Commission to the Five Civilized Tribes found that the Kern-Clifton Commission had enrolled hundreds not entitled to be enrolled under the decree of the court. Complaints came to the Commission to the Five Civilized Tribes in 1898 from every side against the Kern-Clifton roll made in 1896. The freedmen on the 1880 roll and their descendants omitted from the Kern-Clifton roll were demanding to be enrolled, and demanding their rights under the treaty of 1866. This condition of

affairs caused the Commission to the Five Civilized Tribes to recommend the making of a new freedmen roll "in strict compliance" with the decree of the Court of Claims, rendered February 3, 1896, and caused the *Cherokee delegation to resist* the following amendment proposed in the Senate to section 21 of the act of June 28, 1898, to confirm the Kern-Clifton roll:

> "The roll of the freedmen of the Cherokee Nation made under the provisions of the decree entered of record in the Court of Claims of the United States February 6, 1896, in the case of Moses Whitmire, trustee of the freedmen of the Cherokee Nation, against the Cherokee Nation and the United States, is hereby confirmed, and the Commission to the Five Civilized Tribes shall make a roll of said freedmen by adopting the aforesaid roll as made in the aforesaid case. And it shall add thereto the names of the descendants of all persons thereon born since May 3, 1894 [and the names of all persons who applied before the Commission that made the roll of freedmen in said case, and whose names were not placed upon either said roll or the rejected roll of freedmen made by said Commission in said case, if in their judgment the evidence offered before said Commission to the Five Civilized Tribes justifies their being made citizens of the Cherokee Nation in accordance with the provisions of the said decree, and the descendants of said persons born since May 3, 1894]; and from the roll thus made the said Commission shall expunge the names of all persons on said roll who have died since May 3, 1894, or who shall have abjured their citizenship in the Cherokee Nation; and the roll as thus made shall be the final and complete roll of the freedmen of the Cherokee Nation" (Cong. Rec., vol. 31, part 6, p. 5583)."
>
> (Brackets are ours.)

and resulted in the Senate rejecting it. The proceedings in the Senate, inasmuch as counsel for claimants contend that it was the purpose of Congress by section 21 of the act of June 28, 1898, to confirm the Kern-Clifton roll, is of such

great importance that we have caused it to be printed for easy reference as "evidence for defendants" (Rec., pp. 67–70).

The proceedings in the Senate when this amendment was under discussion show that it was objected to by Senator Quay, and that his attention had been invited to it by the Cherokee delegation. Senator Bates also made a like statement in the Senate. The Cherokees were insisting that a new roll be made from original testimony by the Commission to the Five Civilized Tribes; they were insisting that the Kern-Clifton roll was not made in strict compliance with the decree of the Court of Claims of February 3, 1896, and they therefore objected to the amendment confirming the Kern-Clifton roll.

The Court of Claims, however, observes in its opinion that the parenthetical paragraph in the amendment would have authorized the Commission to enroll persons in addition to those whose names were found upon the Kern-Clifton roll. That parenthetical clause could have been easily eliminated, and if it had been the purpose of Congress to have confirmed the Kern-Clifton roll, it would have eliminated the clause referred to, and would have permitted the balance of the amendment to have remained in the bill. And in order to make clear our position upon this point we have thrown brackets around the parenthetical clause, showing how easily it could have been eliminated and the rest would have stood, confirming the Kern-Clifton roll. It would then have provided for the bringing of the Kern-Clifton roll down to date.

The attention of the court is invited to the following provision of section 21 of the act of June 28, 1898, with reference to the roll of Creek freedmen in the same section to which the above amendment with reference to the Cherokee freedmen was offered:

> "The roll of Creek freedmen made by J. W. Dunn, under authority of the United States, prior to March 14, 1867, is hereby confirmed, and said Commission

> is directed to enroll the persons now living whose names are found on said rolls, and all descendants born since the date of said roll to persons whose names are found thereon, with such other persons of African descent as may have been rightfully admitted by the lawful authorities of the Creek Nation."

If it had been intended that the Kern-Clifton roll should be confirmed, Congress would have used language very similar to that used in the confirmation of the Dunn Creek roll. But the Cherokee delegation objected to the amendment and it was rejected. Instead of writing the entire decree of February 3, 1896, into section 21 of the act of June 28, 1898, it was referred to and made the absolute guide of the Commission to the Five Civilized Tribes in making the freedman roll, and the report of the Commissioner to the Five Civilized Tribes (Rec., pp. 100–107) and the instructions of the Secretary of the Interior prepared by Assistant Attorney General Van Devanter on May 11, 1900 (Rec., p. 70), and the decisions of the Commission (Rec., pp. 113–192), and the reports of the Commission filed as evidence in this case (Rec., pp. 79-100), all show that the present freedmen roll was made by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior in strict compliance with the decree of the court. In other words, the decree of the court was to be used as the guide. We insist, therefore, that the Commission to the Five Civilized Tribes did not disregard the decree, that there is not the slightest evidence of it, and that everyone was enrolled adjudged to be entitled to be enrolled under the decree (Rec., pp. 192–199).

Act of 1902 (32 Stat., 716).

The act of July 1, 1902 (32 Stat., 716), after providing in section 25 that the roll should be made as of date September 1, 1902, and containing some other provisions not pertinent to notice here, directed in section 27 as follows:

> "Such rolls shall in all other respects be made in strict compliance with the provisions of section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), and the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one)."

No material change was made in making the freedmen roll except to bring it up to September 1, 1902. It was to be made in all other respects in strict compliance with section 21 of the act of June 28, 1898, and of May 31, 1900, *supra*. The Cherokee Nation ratified said act of July 1, 1902, by a popular vote on August 7, 1902, and it was ratified *with the knowledge that the Senate had rejected the amendment to confirm the Kern-Clifton roll,* and after the provision in said section 21 of the act of June 28, 1898, *supra,* with reference to the making of the freedmen roll, had been interpreted by the Interior Department in instructions issued to the Commission to the Five Civilized Tribes of May 11, 1900 (Rec., p. 70), and after practically all original applications on behalf of freedmen for enrollment as citizens of the Cherokee Nation had been made to the Commission. (Report of Commission filed as evidence for defendants, Rec., p. 85.)

Construction Adopted by Congress.

Congress, in re-enacting said section 21 of the act of June 28, 1898, *supra,* by section 27 of the act of July 1, 1902, *supra,* must have adopted the construction placed upon that section by the Senate, by the Department, Commission to the Five Civilized Tribes, and the Cherokee Nation. In the case of *Sessions vs. Romadka* (145 U. S., 41, 42) the court said:

> "This was practically the construction given to corresponding sections of the act of 1837 by this

> court in *Smith vs. Nichols* (21 Wall., 112), and in the Revised Statutes in *Dunbar vs. Myers* (94 U. S., 187, 193). * * * Congress, having in the Revised Statutes adopted the language used in the act of 1837, must be considered to have adopted also the construction given by this court to this sentence and made it a part of the enactment."

It must be remembered that it was upon the reports of the Commission to the Five Civilized Tribes that both the acts of June 28, 1898, and July 1, 1902, *supra,* were passed by Congress, if both acts were not actually drafted by the Commission.

While the act of July 1, 1902, was being considered in the Senate, Senator Quay (on p. 7358 of the Congressional Record, vol. 35, part 7), on June 25, 1902, said that the proposed bill had been *indorsed* "by the Department of the Interior and by the Dawes Commission."

Congressman J. S. Little, who was a member of the House Committee on Indian Affairs when the same bill was up for consideration in the House on June 30, 1902 (on p. 7696 of the Congressional Record, vol. 35, part 8), said:

> "It is not an agreement, however, but the bill was *prepared* by the representatives of the Indian government *together* with the Commission, and *under the direction* of the Secretary of the Interior."

Unquestionably *the intention* in the re-enactment of section 21 of the act of June 28, 1898, in said section 27 of the act of July 1, 1902, *was to re-enact it as construed* by the Department and the Commission to the Five Civilized Tribes.

Our contention upon this point is supported by the fact that the Department and the Commission have continued to give the same construction to the language found in section 21 of the act of June 28, 1898, and re-enacted in section 27 of the act of July 1, 1902, since the passage of the last-mentioned act and up to the present time. Certainly

no other construction of the language found in section 21 of the act of 1898 was in the mind of Congress. *The Senate had positively refused to confirm the Kern-Clifton roll.*

Courts Will Regard the Contemporaneous Construction by the Executive Officers and Department.

It is well settled that where there is any ambiguity in the language of a statute great weight will be given the contemporaneous construction of the Department of the Government charged with its execution and enforcement.

The Secretary of the Interior, in his instructions to the Commission to the Five Civilized Tribes on November 23, 1899, instructed the Commission to disregard the Kern-Clifton roll. The instructions of the Secretary of the Interior, prepared by Assistant Attorney General Van Devanter on May 11, 1900 (Rec., p. 70), refer to the rejection by Congress of the Kern-Clifton roll in the following language:

> "A roll was made under this decree known as the 'Clifton roll,' which was approved by this Department in 1897. It has been claimed that said roll contains many names not properly belonging there, but whether this fact *influenced Congress to disregard that roll* and *direct that a new one* be made in strict compliance with said decree, is immaterial, *for the fact remains that the decree alone is to be taken as a guide for making the roll which your Commission is to prepare.*"

This statement shows that the Cherokees were protesting against the Kern-Clifton roll and claiming that it was erroneous.

The Commission to the Five Civilized Tribes began making the freedmen roll in 1900, and commenced writing decisions rejecting people who were upon the Kern-Clifton roll in 1902, and a test case was made of the *Henry C. Hayden case* (Rec., p. 88), involving among others the question of the Kern-Clifton enrollment.

In the *Mary Ann Riley case* the Assistant Attorney General for the Interior Department decided that the Kern-Clifton roll was not confirmed, and for easy reference said decision is printed as "Evidence for Defendants" (Rec., pp. 75-79). In the case of *Brown vs. United States* (113 U. S., 568), where the question of what weight should be given to the contemporaneous construction of certain language by the Navy Department was being considered, the court said:

> "It must be conceded that were the question a new one the true construction of the section would be open to doubt. But the findings of the Court of Claims show that soon after the enactment of the act the President and the Navy Department construed the section to include warrant as well as commissioned officers, and that they have since that time uniformly adhered to that construction, and that under its provisions large numbers of warrant officers have been retired. This contemporaneous and uniform interpretation is entitled to weight in the construction of the law, and in case of doubt ought to turn the scale.
>
> "In *Edwards vs. Darby* (12 Wheat., 206) it was said by this court that 'in the construction of a doubtful and ambiguous law the contemporaneous construction of those who were called upon to act under the law and were appointed to carry its provisions into effect is entitled to great respect.'
>
> "This case is cited upon this point with approval in *Adkins vs. Disintegrating Co.* (18 Wall., 272, 301), *Smythe vs. Fisk* (23 Wall., 374, 382), *United States vs. Pugh* (99 U. S., 265), and in *United States vs. Moore* (95 U. S., 760, 763). In the case last mentioned the court said that 'the construction given to a statute by those charged with the duty of executing it * * * ought not to be overruled without cogent reasons. * * * The officers concerned are usually able men and masters of the subject. Not infrequently they are the draftsmen of the laws they are afterwards called upon to interpret.' And in the case of *United States vs. Pugh* the court said: 'While, therefore, the ques-

> tion'—the construction of the abandoned and captured property act—'is one by no means free from doubt, we are not inclined to interfere at this late day with a rule which has been acted upon by the Court of Claims and the Executive for so long a time.' (See also *United States vs. State Bank of North Carolina,* 6 Pet., 29; *United States vs. Alexander,* 12 Wall., 177; *Peabody vs. Stark,* 16 Wall., 240, and *Hahn vs. United States,* 107 U. S., 402.)"

The decision in the case of *United States vs. Moore* (95 U. S., 763) is peculiarly applicable to this case. In that case the court said:

> "The construction given to a statute by those charged with the duty of executing it * * * ought not to be overruled without cogent reasons. * * * The officers concerned are usually able men and masters of the subject. Not infrequently they are draftsmen of the laws they are afterwards called upon to interpret."

In the case at bar the officers were not only charged with the duty of executing the acts of Congress in question, but the acts were based upon their reports and the information they gave the Indian committees of Congress, if they did not actually draft them.

The Supreme Court in the case of *Sac and Fox Indians of Iowa vs. Sac and Fox Indians of Oklahoma,* upon this point, on April 24, 1911 (220 U. S., 481), said:

> "The decision below was according to long-established construction and practice of the Department, a fact entitled to much weight in a case like this."

This is the latest expression of this court in a case appealed from the Court of Claims.

Language of Laws and Treaties Construed Favorable to Indians.

The courts have uniformly held that the language of laws and treaties should be construed as understood by the Indians rather than by their technical meaning. In the case of *Worcester vs. Georgia* (6 Peter, 515), the court said (p. 582):

> "The language used in treaties with the Indians should never be construed to their prejudice. If words be used which are susceptible of a more extended meaning than their plain import as connected with the tenor of the treaty, they should be construed as used in the latter sense. * * * How the words of a treaty were understood by this unlettered people rather than their critical meaning should form the rule of construction."

It is quite clear that the Cherokees understood when they ratified the act of July 1, 1902, which contained section 27, re-enacting section 21 of the act of June 28, 1898, *supra*, the provision contained therein—

> "It shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen ninety-six"—

to mean that the roll should be made, using the decree, and not the Kern-Clifton roll, as the guide. This is shown by the fact that the Cherokee delegation protested against the amendment proposed to the act of June 28, 1908, confirming the Kern-Clifton roll (Rec., p. 68); and Assistant Attorney General Van Devanter, in his instructions to the Commission, May 11, 1900 (Rec., p. 72), says:

> "It has been claimed that said roll contains many names not properly belonging there."

The report of the Commission to the Five Civilized Tribes for 1903 (Rec., p. 88) shows that in September, 1902, this very question was orally argued before the Commission to the Five Civilized Tribes, that it was briefed, and a test case, the *Henry C. Hayden case,* was prepared and forwarded to the Secretary of the Interior. In fact, it cannot be shown where the Cherokees at any time since the passage of the act of June 28, 1898, ever indicated that they construed it to mean a confirmation of the Kern-Clifton roll.

No claim was made then that the roll was a part of the decree of the court.

The only claim then made on behalf of petitioners was that Congress had no authority to change the method of making the roll, but that question has been settled in the case of *Wallace vs. Adams* (204 U. S., 415).

No Ambiguity in the Language.

But there is no ambiguity in the language contained in section 21 of the act of June 28, 1898, *supra.* The Commission was instructed:

> "It shall make a roll of Cherokee freedmen in *strict compliance* with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six."

In other words, the Commission was directed to look to and be guided by the decree alone, and the report of the Department of the Interior filed as evidence in this case (Rec., pp. 100-107) shows that that was the opinion entertained by the Secretary of the Interior, the Commission to the Five Civilized Tribes, and its successor, the Commissioner to the Five Civilized Tribes, and that the final roll of Cherokee freedmen was made as directed by said decree.

The decree provided that only those claimants should be enrolled as freedmen citizens of the Cherokee Nation who

were either slaves or free colored persons residing in the Cherokee Nation at the commencement of the rebellion, or who returned thereto within six months from the making of the treaty of July 19, 1866, and their descendants; that the authenticated Cherokee roll of 1880 should be accepted as conclusive of the right of all persons whose names appeared thereon, and that no person should be enrolled who had forfeited or abjured his citizenship.

The instructions to the Commission issued by the Department on May 11, 1900 (Rec., p. 70), are in exact accord with the decree. That is what Congress directed. That is what the Commission to the Five Civilized Tribes did (Rec., pp. 100-107).

Act of April 26, 1906 (34 Stat., 137).

Section 3 of the act of April 26, 1906, shows conclusively that Congress never intended to confirm the Kern-Clifton roll:

> "The roll of Cherokee freedmen shall include only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants, *who were actual personal bona fide residents* of the Cherokee Nation August eleventh, eighteen hundred and sixty-six, or who actually returned and established such residence in the Cherokee Nation on or before February eleventh, eighteen hundred and sixty-seven." (*Italics* are ours.)

Why was the above provision enacted directing the Commission to enroll only such freedmen "who were actual personal bona fide residents of the Cherokee Nation August eleventh, eighteen hundred and sixty-six, or who actually returned and established such residence in the Cherokee Nation on or before February eleventh, eighteen hundred and sixty-seven," if the Kern-Clifton roll was confirmed? If you could not go behind the Kern-Clifton roll, which was

made in 1896, why direct that only those persons who were actual personal bona fide residents of the Cherokee Nation on February 11, 1867, and their descendants should be enrolled? In our judgment this alone is conclusive of the construction that Congress intended should be placed on section 21 of the act of June 28, 1898. In other words, it shows that Congress intended that the application of every freedman claimant should be received and inquired into; that if his name appeared upon the authenticated roll of 1880, or was the descendant of such a person, or if he were a slave or a free colored person residing in the Cherokee Nation at the commencement of the rebellion and returned thereto on or before February 11, 1867, and became an actual personal bona fide resident and had not abjured his citizenship, and was living, he would be entitled to be enrolled as a freedman citizen of the Cherokee Nation.

Subsequent Congressional legislation may be considered as an aid to the interpretation of prior legislation upon the same subject (Marchie Tiger case, 221 U. S., 286).

But the fact that his name was upon the Kern-Clifton roll, or the descendant of such a person, was not of itself sufficient to entitle the applicant to enrollment.

The Court of Claims (Rec., p. 230), commenting upon this section, finds that it was not intended by said provision—

> "to prevent the enrollment of any person who had theretofore made application to the Dawes Commission, and who had been adjudged entitled to enrollment by the Secretary of the Interior. There is nothing in this act, apparently, to prevent the court from proceeding."

This proviso only applies to those freedmen *who made application to the Commission to the Five Civilized Tribes or its successor* and had been adjudged entitled to be enrolled by the Secretary of the Interior. It had no reference to the Kern-Clifton roll, because in the making of that roll

the applications were not filed with "the Commission to the Five Civilized Tribes or its successor," and therefore could only have applied to the making of the freedmen roll by the Commission to the Five Civilized Tribes or its successor, under the direction of the Secretary of the Interior. The Secretary of the Interior had held in a few freedmen cases—perhaps some three or four, and among them the *Charles Foreman case* (Rec., p. 73)—that a freedman could constructively reside in the Cherokee Nation whether he had physically returned to the Nation within the six months prescribed by the treaty of 1866 or not, and that a physical return within the six months prescribed by the treaty was not necessary. In the case of Burrel Daniels, the Assist-Attorney General for the Interior Department, on May 9, 1905, in an opinion remanded the case for further investigation by the Commission, although Daniels did not return to the Creek Nation until 1884 and to the Cherokee Nation until 1896, or 29 years after the time prescribed by the treaty had expired. Particular attention is invited to the decision of the Commission to the Five Civilized Tribes in this case (Rec., p. 127). Burrel Daniels was enrolled upon the Kern-Clifton roll. The Commission upon investigation now finds that he did not return to the Indian Territory and Creek Nation until 1884, and not to the Cherokee Nation until 1896, and was not therefore in the Cherokee Nation when the Kern-Clifton roll was made, although his name and the members of his family are found upon said roll. The commission had heard a great deal of testimony in this case, had denied the applicants, and the Department on May 9, 1905, had remanded the case for a further investigation. The Cherokee Nation insisted that he was not entitled to be enrolled, that he did not come within the decree of the Court of Claims, and therefore appealed to Congress *for a legislative construction* of the decree, which resulted in the enactment of section 3 of the act of April 26, 1906. The Cherokees were alarmed lest the period of limitation for

return might be too liberally construed and vigorously protested against the construction and appealed to Congress for legislative relief, which resulted in the enactment of the above provision. But a few freedmen had already been enrolled under the above construction by the Secretary of the Interior, and Congress, by the act of April 21, 1904 (33 Stat., 189), had permitted adult freedmen to alienate their surplus lands, and innocent purchasers for value had bought some of it, and it was for their protection the above proviso was added. This provision, however, did not prevent the Secretary of the Interior from investigating, after due notice given, the case of anyone previously adjudged entitled to enrollment.

If the Kern-Clifton roll had already been confirmed, and if the Commission could not go behind it, why should Congress, in 1906, direct that the freedmen roll should include only those freedmen "who were actual personal bona fide residents of the Cherokee Nation August eleventh, eighteen hundred and sixty-six, or who actually returned and established such residence in the Cherokee Nation on or before February eleventh, eighteen hundred and sixty-seven."

The Kern-Clifton roll was made in 1896 and as of date May 3, 1894. Why go behind that roll for thirty years and inquire of the freedmen "who were actual personal *bona fide* residents of the Cherokee Nation August eleventh, eighteen hundred and sixty-six, or who actually returned and established such residence in the Cherokee Nation on or before February eleventh, eighteen hundred and sixty-seven," if the Kern-Clifton roll was confirmed? Clearly Congress directed the Commission to the Five Civilized Tribes to go behind it and to make *a correct roll* of Cherokee freedom in *strict compliance* with the decree.

This same section of the act of April 26, 1906, contains the following paragraph *the second time,* confirming the Creek freedmen roll prepared by J. W. Dunn:

> "That the approved roll of Creek freedmen shall include only those persons whose names appear on the roll prepared by J. W. Dunn, under authority of the United States prior to March fourteenth, eighteen hundred and sixty-seven, and their descendants born since said roll was made, and those lawfully admitted to citizenship in the Creek Nation subsequent to the date of the preparation of said roll, and their descendants born since such admission, except such, if any, as have heretofore been enrolled and their enrollment approved by the Secretary of the Interior."

If Congress had intended to confirm the Kern-Clifton roll, why did it not use similar language with reference to the Cherokee freedmen roll? We have heretofore shown that the Dunn roll was confirmed by section 21 of the act of June 28, 1898, when the Senate rejected an amendment to confirm the Kern-Clifton roll. We submit that the confirmation of the Dunn roll by Congress in the acts of 1898 and 1906, and the refusal to confirm the Kern-Clifton roll in 1898, and the insertion of the provision in the act of 1906 requiring the physical return of Cherokee freedmen on or before February 11, 1867, is conclusive of the intention of Congress not to confirm the Kern-Clifton roll.

This court said in the recent case of Marchie Tiger (221 U. S., 286).

> "Had Congress intended * * * it would have been easy to have said so."

Attention is invited by the opinion of the court to the statement of counsel for the Cherokee Nation to the effect that the provision in section 3 of the act of April 26, 1906, with reference to Cherokee freedmen, was enacted upon his recommendation. That is correct. But we have already shown (Rec., p. 68) that the Cherokee delegation protested against the confirmation of the Kern-Clifton roll of 1898, that Assistant Attorney General Van Devanter (Rec., p. 72), in his instructions to the Commission on May 11, 1900,

refers to the fact that it was charged that the names of many persons were upon the Kern-Clifton roll not entitled to be thereon; that the attorney for the Cherokee Nation before the Commission to the Five Civilized Tribes, in September, 1902 (Rec., p. 88), insisted that the Kern-Clifton roll was not to be taken as a basis for making the present freedmen roll, and that the *Hayden case* was made a test case, and the opinion of the Assistant Attorney General in the *Charles Foreman case* shows that the Nation was alarmed at the decision of the department on constructive return (Rec., p. 73); and in view of this record of the attorney for the Nation, certainly when he urged upon Congress the enactment of the provision contained in section 3 of the act of 1906, he could not have had in mind, and it was not his purpose, that the provision should be construed as a confirmation of the Kern-Clifton roll, the very thing that he had been fighting against for the eight years immediately prior thereto.

The Making of the Kern-Clifton Roll Did Not Inspire Confidence.

This roll was begun in April, 1896, and the taking of the testimony by only one stenographer was concluded August 8, 1896. None of the testimony was transcribed while cases were being heard for use as the evidence was introduced, and but little of the testimony was ever transcribed for the use of the Kern-Clifton Commission when it made up the roll. At least but little of the testimony could ever be found upon file with their report to the Secretary of the Interior. One of the commissioners, Mr. Kern, had been the attorney of record for the freedmen, and notwithstanding the positive decision of the court on February 18, 1896, addressed to the Commissioner of Indian Affairs, with reference to the necessity of return on the part of all the freedmen, either slaves or free colored persons, he, on April 14, 1896, attempted to get the Court of Claims to modify its in-

structions so as to leave the question of the return of freedmen to the Commission, which was refused by the court. The statements contained in this petition, together with the instructions then asked for, are printed as "Evidence for defendants" (Rec., pp. 65-66), and shows the frame of mind of this Commissioner and in part accounts for the Commission ignoring the decree of the court and making a roll for which the Commission to the Five Civilized Tribes would not stand.

Method of Making Kern-Clifton Roll.

The Kern-Clifton Commission did not have the testimony in each case, did not and could not carefully consider each case, did not write an opinion in any case, and therefore no separate opinions were considered and approved by the Secretary of the Interior. But this Commission made up a roll largely from memory, and that was submitted to and approved by the Secretary of the Interior as a whole.

Particular attention is invited to the letter of the Commissioner of Indian Affairs dated January 16, 1897, filed as evidence for defendants (Rec., p. 108), transmitting the Kern-Clifton roll to the Secretary of the Interior. It confirms every statement we have made about the making of this roll. This letter shows that there were 5,770 freedmen applicants; that the Kern-Clifton Commission was at work only 66 days; that a total of 4,552 freedmen were enrolled; that "no evidence was submitted by the Commission" in behalf of any person enrolled as a freedman; that as to rejected claimants "testimony taken in several cases was submitted;" that there were a number of duplications upon the roll; that the roll was not made descriptive of the persons so as to identify them; that Kern and Clifton recommended the enrollment of Burrell Daniels and of George and July Bell. The letter also calls attention to the "limited time allowed" for the examination of the roll by the commissioner.

The Secretary of the Interior approved this roll on Jan-

uary 18, 1897, two days thereafter. There is no evidence that it was submitted to the Cherokee Nation before approval; in fact that was a physical impossibility.

The attention of the court is invited to the instructions of the Secretary to the Kern-Clifton Commission on February 20, 1896 (Rec., p. 63), as follows:

> "A vote of a majority of the commission shall be sufficient to entitle the person to be enrolled on schedule as a beneficiary of aforesaid fund."

The Court of Claims in its opinion on page 91 said:

> "We are bound to presume that the Kern-Clifton roll was made in compliance with the decree, because the decree was entered by consent."

And then argues that the distribution was made under it. That is true, but it does not make the roll correct. Distribution was made in the *Pam-To-Pee case,* and the court found the roll incorrect. If the money had not been distributed in that case the court would have corrected the roll. And again, on page 93, the Court of Claims adds:

> "There is no proof that the Kern-Clifton roll was made in disregard of the decree. Presumptively it was correct, not only because there were no exceptions filed to it, but it came to the court with the approval of the Secretary of the Interior as including the names of all freedmen erroneously admitted by the previous Cherokee census. There may have been mistakes in the Kern-Clifton roll, and doubtless were."

The Court of Claims observes that presumptively it was correct, (1) because no exceptions were filed to it. In this connection reference is again made to the letter of the Commissioner of Indian Affiairs dated January 16, 1897, forwarding the Kern-Clifton roll to the Secretary of the Interior, which he approved January 18, 1897 (Rec., p. 108). This letter

does not show that this roll was ever submitted to the Cherokee Nation before the same was approved by the Secretary of the Interior January 18, 1907; and (2) because the Secretary approved it.

The Court of Claims overlooked the fact that the same officer, the Secretary of the Interior, now reports to the court that after a detailed investigation of each case, through the Commission to the Five Civilized Tribes for seven years, after hearing thousands of witnesses, after considering written opinions in each case, that he now knows that the Kern-Clifton roll was not correct, but that it omitted 174 persons whose names were on the Cherokee authenticated roll of 1880, and *included a large number* that the Court of Claims, by its decree of February 3, 1896, and its decision of February 18, 1896, *directed should not be enrolled.* In other words, the *Secretary now finds and reports to this court that the Kern-Clifton roll was not made in accordance with the decree of this court.* We respectfully urge upon the court that the last decisions of the Secretary of the Interior denying the right of enrollment to these people should not only be presumptive evidence that the Kern-Clifton roll was made in disregard of the decree of this court, but conclusive evidence of that fact.

The Two Rolls Contrasted.

Contrast the methods of making the two rolls: The Kern-Clifton Commission was engaged 66 days in hearing the applications of 5,770 persons; with only one stenographer; no testimony in admitted cases written, and but little in rejected cases; writing no opinions, and therefore submitting no opinions in individual cases to the Secretary of the Interior for approval. On the other hand, the Commission to the Five Civilized Tribes began receiving applications May 11, 1900, and the final roll was completed and approved March 4, 1907. Almost seven years were consumed in the preparation of this roll; the testimony was stenographically

taken in each individual case; both parties furnished with a copy of it; and both applicant and the Nation represented by attorneys. Written opinions were rendered in each case; forwarded through the Commissioner of Indian Affairs to the Secretary of the Interior, with briefs for either side, and those freedmen enrolled who were adjudged entitled by the Secretary of the Interior. Certainly no court of equity will give greater presumptive weight to the Kern-Clifton roll than that prepared by the Commission to the Five Civilized Tribes.

We again restate to the court that the Kern-Clifton roll was not made in strict compliance with the decree of the Court of Claims dated February 3, 1896. Counsel for petitioners have heretofore vigorously denied the statement. The Court of Claims said (see p. 229):

> "There is no proof that the Kern-Clifton roll was made in disregard of the decree. Presumptively it was correct, not only because there were no exceptions filed to it, but it came to the court with the approval of the Secretary of the Interior as including the names of all freedmen erroneously admitted by the previous Cherokee census."

In order to bring the court to a better understanding of our position, and in order to overcome the presumption referred to by the Court of Claims, we have printed as "Evidence for the defendants" the report of the Commissioner of Indian Affairs dated January 16, 1897 (Rec., p. 108), transmitting the Kern-Clifton roll to the Secretary of the Interior and the decisions in a number of typical freedmen cases, who were enrolled upon the Kern-Clifton roll, but who were found not to be entitled to be enrolled after an investigation extending over a number of years by the Commission to the Five Civilized Tribes (Rec., pp. 112–192).

Typical Freedmen Cases, Showing that the Kern-Clifton Roll was Made in Disregard of the Decree of the Court of Claims.

The reports of the Commission to the Five Civilized Tribes (Rec., pp. 79–100) show that all persons so desiring could make application to be enrolled, that all the testimony offered in their behalf was stenographically recorded, and also the testimony offered on behalf of the Cherokee Nation, that they were represented by attorneys, their cases were briefed, written decisions prepared, copies furnished to each applicant, the decisions of the Commission were forwarded through the Commissioner of Indian Affairs to the Secretary of the Interior for his approval. The reports also show that the testimony in a great many cases was very voluminous (Rec., p. 83).

We desire to call the attention of the court to decisions as prepared by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior to show that the Kern-Clifton roll was made in disregard of the decree of the court. On April 14, 1896, the record shows that R. H. Kern, one of the commissioners and former attorney for the freedmen, petitioned the Court of Claims for certain instructions, and in this petition (Rec., p. 65), after stating that he had been to the Cherokee Nation, he stated "that he finds in many instances the former slaves of the Cherokee Nation during the rebellion were taken from that country by their owners, the Cherokees, to the far Southern States, and in some instances to Old Mexico." The motion for instructions was overruled April 15, 1896 (Rec., pp. 66-67). The Court of Claims refers to this motion made on behalf of petitioners and the action of the court (Rec., p. 221) in its opinion, and refers to the fact that the court overruled the motion and indicates that the commissioners in making the Kern-Clifton roll abided by their instructions and refused to enroll this class of applicants. We insist that the opposite is true.

They enrolled them, anyhow. *The petitioners are all of this class.* These typical concrete cases now presented to the court show this beyond question. The Mexico case referred to was a celebrated case. There was but one such case. It was that of Burrel Daniels and family.

Burrel Daniels Case.

The decision of the commissioner in this case shows that Burrel Daniels voluntarily went to Old Mexico in 1865; that he removed to Texas in 1872; that he came to the Creek Nation, in the Indian Territory (now Oklahoma), in 1884; that he did not remove to the Cherokee Nation until 1896; and that certain members of his family, including Tom Daniels, did not remove to the Cherokee Nation until after that date. There is no dispute as to the facts. The names of Burrel Daniels and members of his family are found upon the Kern-Clifton roll, in disregard of the decree of the Court of Claims dated February 3, 1896, and in whose behalf this court refused to instruct on April 15, 1896, and the Cherokee Nation insists that this court shall not now direct the enrollment of this family upon the present final freedmen roll (Rec., p. 127).

The Commissioner of Indian Affairs, in his letter to the Secretary, states that Commissioners Kern and Clifton stated that Daniels returned in 1870 and recommended the enrollment of himself and family (Rec., p. 111). He was required to return by the decree of February 3, 1896, on or before February 11, 1867.

Can this court say that the enrollment of this family was authorized by or in strict compliance with the decree of February 3, 1896?

George and July Bell.

The decision of the Commission to the Five Civilized Tribes, approved by the Secretary of the Interior (Rec., p. 174), in this case shows that the applicants returned to the Cherokee Nation in May, 1867. There is no dispute as to the facts. Their names are found upon the Kern-Clifton roll in disregard of the decree.

Henry C. Hayden et al.

The report of the Commission to the Five Civilized Tribes for the year 1903 (Rec., p. 88) shows that this case was a test case. The decision of the Commission finds that Henry C. Hayden and family were residents of the State of Kansas "from 1866 up until about 1873, and that they did not remove to and take up their residence in the Cherokee Nation until after that year" (Rec., p. 146).

This decision also finds that Sarah E. Buckner, daughter of Maria Hayden, married in the State of Kansas and "resided with her husband in the State of Kansas for eight years or more after their marriage in 1873.' She did not therefore come to the Nation until about 1881, yet all of these people are enrolled upon the Kern-Clifton roll. Can the Court of Claims now say that the enrollment of this family was a compliance with the decree of February 3, 1896?

Thomas Bell et al.

The decision of the Commission is to the effect that one of the applicants, Tensie Bell, was not a resident of the Cherokee Nation at the commencement of the rebellion, and that none of the applicants returned to the Nation and established a residence therein "within the time specified in the decree of the Court of Claims rendered on February 3, 1896, in the case of *Moses Whitmire, trustee, etc., vs. The Cherokee Nation et al.*" (Rec., p. 153).

Sallie Mayfield et al.

The decision of the Commission shows that the principal applicants, Sallie Mayfield and Thomas Mayfield, through whom the other applicants in this case claim, were not residents of the Cherokee Nation at the commencement of the rebellion, but were residents of the State of Texas; and the decision also finds that the evidence shows that neither of them "returned to and established a residence in the Cherokee Nation within the time specified in the decree of the Court of Claims rendered on February 3, 1896, in the case of *Moses Whitmire, trustee, etc., vs. The Cherokee Nation et al.*" (Rec., p. 155).

Elijah Watie.

The Commission found in its decision in this case as follows:

> "It does not appear from the evidence that the applicant was the slave of a Cherokee citizen, or a free colored person residing in the Cherokee Nation at the commencement of the rebellion" (Rec., p. 157).

Clearly he was not entitled to be enrolled under the decree.

Joann Taylor et al.

In the case of Joann Taylor *et al.* the decision of the Commission recites that the principal applicant was a slave at the commencement of the rebellion and resided in the Cherokee Nation when the treaty of 1866 was made, and then found that "soon thereafter she removed to and became a citizen of the State of Arkansas, where she remained for a period of about 20 years, when she returned to the Cherokee Nation, where she has since resided." It is further shown that during her residence in Arkansas she owned no property of any description in the Cherokee Nation.

Section 2, article 1, of the Cherokee constitution provides that—

> "* * * whenever any citizen shall remove with his effects out of the limits of this Nation, and becomes a citizen of any other government, all his rights and privileges as a citizen of this Nation shall cease."

The Commission rejected all of the applicants as not being entitled under the decree of February 3, 1896, which provides:

> "It being understood that the freedmen and their descendants and free colored persons above referred to shall include only such persons of said class as have not forfeited or abjured their citizenship of said Cherokee Nation at the date of the entering of this decree" (Rec., p. 161).

We submit that a court of equity under the above finding by the Commission would be compelled to decide that the applicants forfeited their rights to citizenship in the Cherokee Nation.

Esther Holt.

The Commission found in its decision in this case that the principal applicant did not return to the Cherokee Nation "within the time specified in the decree of the Court of Claims of February 3, 1896," and that therefore the applicant was not entitled (Rec., p. 159).

Esau Fox et al.

In the case of Esau Fox *et al.* the Commission found in their decision that they "did not return thereto (Cherokee Nation) and take up their residence therein until after February 11, 1867," and for that reason rejected the applicants (Rec., p. 170).

William H. Buffington et al.

The Commission rejected the applicants in this case because it found in its decision that they did not return to and take up a residence in the Cherokee Nation within six months after the promulgation of the treaty of 1866 (Rec., p. 184).

Katie Blackwell et al.

The decision of the Commission in this case finds that the principal applicants did not return to the Cherokee Nation within the time prescribed by the treaty of 1866, and for that reason they were rejected (Rec., p. 179).

John Freeman et al.

The decision of the Commission in this case shows that a great deal of testimony was taken in it and reviews at length the testimony; it recites that three witnesses for the applicants, "Sam Webber, Franklin Ross, and George W. Vann, have testified in numerous freedman cases, and have been repeatedly and successfully contradicted, and their testimony is entitled to little credence." It also shows that witnesses were before the Commission from the State of Kansas, which illustrates the number of witnesses introduced before the Commission and the care taken in preparing opinions. The decision of the Commission further found that the applicants did not return within the time prescribed by the treaty of 1866, and they were denied (Rec., p. 187).

We insist that all of the concrete cases hereinabove referred to are typical cases, conclusively showing to the court that every statement that we have heretofore made was correct; that applications in all cases were received, testimony for both sides taken, the testimony carefully considered, a written opinion prepared which was forwarded

through the Commissioner of Indian Affairs to the Secretary of the Interior for his approval. We most respectfully insist, therefore, that every applicant desiring to be heard was not only sure of a hearing, but of a full and complete hearing and a careful consideration of his case. He was allowed to be represented by an attorney, and every question of law or fact he desired to present was submitted and considered.

Petitioners are Those Whom this Court Directed Not to Enroll—Facts Desired to be Presented Were Submitted and Considered.

We have heretofore shown that every person whose name appeared upon the supplemental decree issued by this court on February 20, 1911, and who made application to the Commission to the Five Civilized Tribes, had his case heard, considered, and determined in exactly the same manner that the parties had illustrated by the concrete cases. They were enrolled by the Kern-Clifton Commission in direct violation of the express injunction of this court. Upon investigation, the Secretary of the Interior found that the decree had not been followed by the Kern-Clifton Commission in that the Kern-Clifton Commission omitted many freedmen whose names were on the 1880 Cherokee roll, and enrolled many not entitled under the decree. Congress directed a new roll to be made in strict compliance with the decree, and that has been done. Now these same petitioners whom the court directed not to enroll on February 18, 1896, and by the decree, are again before the court. A judgment has been rendered by the Secretary of the Interior in the case of each petitioner, finding him not entitled under the decree of February 3, 1896, and subsequent legislation.

Freedmen Not Discriminated Against, but Their Cases Patiently Considered by the Commission to the Five Civilized Tribes.

The report of the Commissioner to the Five Civilized Tribes for the year ending June 30, 1907 (Rec., p. 100), shows that there were enrolled on the final Cherokee roll as Cherokee freedmen 4,305 and as Cherokee freedmen minors 619, a total of 4,924. This statement shows that the applications of freedmen were fairly considered. The Kern-Clifton roll contained 4,552 freedmen enrolled as of date May 3, 1894. The Commission to the Five Civilized Tribes eliminated from this roll those who had died, those who had forfeited their citizenship by nonresidence, and those whom they found, upon a rehearing, were not entitled under the decree of February 3, 1896, and added those erroneously omitted by the Kern-Clifton Commission, whose names were on the Cherokee roll of 1880, and the descendants of all those found entitled born since the Kern-Clifton roll was made.

Reasons Why the Kern-Clifton Roll was Not Confirmed.

Congress did not intend to confirm the Kern-Clifton roll, and this is shown—

First. By the language of the act itself, which directs that the roll be made *in strict compliance* with the decree of the Court of Claims rendered February 3, 1896.

Second. No mention was made of the Kern-Clifton roll, and if it had been intended to confirm it Congress would have so provided in the act. *Effort was made in the Senate to have it confirmed, and the amendment was rejected* **(Rec., p. 70).**

Third. The Cherokee authenticated roll of 1880 was mentioned and confirmed *as the only Cherokee roll intended to be confirmed,* and the Dunn roll of Creek freedmen was also confirmed; and if it had been intended to confirm the Kern-Clifton roll the act would have confirmed it, as it did the Dunn roll and the Cherokee authenticated roll of 1880, and the Senate would not have rejected an amendment to confirm it.

Fourth. The contemporaneous construction of the Interior Department and the Commission to the Five Civilized Tribes conclusively shows that it was not the intention to confirm the Kern-Clifton roll.

Fifth. The subsequent re-enactment of section 21 of the act of June 28, 1898, in section 27 of the act of July 1, 1902, shows that Congress intended to adopt the construction placed on section 21 of said act of 1898, and was not intended as a confirmation of the Kern-Clifton roll.

Sixth. The debate in the Senate pending the passage of the act of June 28, 1898, shows that the Cherokee delegation protested vigorously against the confirmation of the Kern-Clifton roll (Rec., p. 68).

Seventh. The enactment of section 3 of the act of April 26, 1906, shows conclusively that Congress never intended to confirm the Kern-Clifton roll, but authorized the Commission to make a roll directed by the decree in accordance with the ninth article of the treaty of 1866. The Dunn roll of Creek freedmen was again confirmed.

Did Congress Have the Power to Change the Method of Making the Cherokee Freedmen Roll?

The case of *Wallace vs. Adams* (143 Fed. Rep., 716) reviews at length the power of Congress to change at any time the method of making the rolls of citizenship of the Five Civilized Tribes. In that case the court held:

> "Congress necessarily had the authority under the Constitution at any time before an allotment of land under its previous acts had been finally made to the defendant, and his right to the land had thereby become vested, to repeal its previous legislation, to change its method of determining the issue, to strike down any decision that had been made under its previous acts, *to prescribe a new method* of deciding the question, or to refuse to determine it altogether and leave the claim of the defendant as it found it, conclusively barred by its rejection by the Choctaw Nation."

And in further speaking of the power of Congress *to change the method* of making the roll of citizens of the Five Civilized Tribes the court said:

> "Now, as the power conferred upon the courts in the Indian Territory and upon the Supreme Court respecting the decision of the question who were citizens of the Indian tribes was purely legislative and administrative, and the entire question still remained subject to congressional action, the legislative department had the same power at any time before allotments were made and the rights of allottees became vested to disregard or to authorize a review of the decisions of these courts by other tribunals that it would have had to have disregarded or reviewed the decisions of an Indian agent, a commission, or a committee if it had conferred this power upon them. The decisions of the Supreme Court in *Stephens vs. Cherokee Nation* (174 U. S., 445, 488; 19 Sup. Ct., 722; 43 L. Ed., 1041) and *Cherokee Nation vs. Hitchcock* (187 U. S., 294, 306; 23 Sup. Ct., 115; 47 L. Ed., 183) adequately sustain this conclusion."

This case was affirmed by the Supreme Court (204 U. S., 415). This entire question, however, was examined at great length by the Court of Claims in the case of *Muskrat and*

Dick vs. The United States, (44 C. Cl.,137) decided on January 4, 1909.

Stephens case (174 U. S., 445).
Goldsby case (211 U. S., 249).
Roff vs. Burney (168 U. S., 222).

It would seem, therefore, that there is no doubt of the plenary power of Congress to change any method in determining the question of citizenship before the lands were actually selected in allotment, and no lands were allotted prior to the passage of the acts approved June 28, 1898, or July 1, 1902, for the Cherokee land office was not opened until January, 1903.

No Vested Interests in Enrollment as Citizens.

This question seems to have been so definitely settled in the *Stephens case, supra,* and the case of *Wallace vs. Adams, supra,* as to require no further comment, yet petitioners' only claim to right of enrollment in this case is based on their enrollment in 1896 by the Kern-Clifton Commission.

The Court of Claims in the Sac and Fox Indian case (45 C. Cl., 287), held:

> "Furthermore, the Supreme Court has decided that there is no vested interest in unallotted tribal lands and undistributed tribal funds. As was said in the case of *Stephens vs. The Cherokee Nation* (174 U. S., 445), '* * * the lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms.' The same principle was laid down in *Wallace vs. Adams* (143 Fed. R., 716), which was subsequently affirmed by the Supreme Court (204 U. S., 415)."

This was affirmed by this court on April 24, 1911, (220 U. S., 481).

The Court of Appeals, District of Columbia, in the Goldsby case (30 D. C. App., 177), held: "It is quite true that individual members of the Indian tribes had no vested rights in the lands by virtue of enrollment only", and this opinion was affirmed by the Supreme Court, (211 U. S., 249).

Ligon vs. Johnston, 164 Fed. R., 670.
Hayes vs. Barringer, 168 Fed. R., 221.
Cherokee Nation vs. Hitchcock, 187 U. S., 294.
Conley vs. Ballinger, 216 U. S., 84.
Fleming vs. McCurtain, 215 U. S., 415.

Cherokee Constitution.

Section 2, article 1, of the Cherokee constitution in part provides:

> "Whenever any citizen shall remove with his effects out of the limits of this nation and becomes a citizen of any other government all his rights and privileges as a citizen of this nation shall cease."

This provision of the Cherokee constitution was, on March 23, 1908, construed by the Court of Claims in the case of *Joseph P. T. Fish vs. The United States,* No. 29884.

The decree of the Court of Claims of date February 3, 1896, which is the subject of review in this proceeding, as to forfeiture of citizenship, provided:

> "It being understood that the freedmen and their descendants and all free colored persons above referred to shall include only such persons of said class as have not forfeited or abjured their citizenship of said Cherokee Nation at the date of the entering of this decree."

Purpose of the Kern-Clifton Roll.

The Kern-Clifton roll was made as of date May 3, 1894, because it was made for the purpose of distributing the money judgment, and that was the date of the last act of the Cherokee legislature providing for a per capita payment to the exclusion of the freedmen. The decree recites:

> "And it is further ordered and adjudged that for the *purpose* of ascertaining and determining who are the individual freedmen of the Cherokee Nation *now entitled to share in the distribution of the said sum of $903,365,* the Secretary of the Interior be authorized to appoint three commissioners," etc.

It is further ordered in said decree that the commissioners should proceed to the Cherokee country and "hear the testimony both for and against the identity of all freedmen, free colored persons and their descendants, *claiming to be entitled to share in the distribution of said $903,365.*"

The roll was to be approved by the Secretary of the Interior and *not by the Court of Claims,* and the money judgment was to be distributed to those who names were found on the roll, and this was done. When the Kern-Clifton roll was made, in 1896, no act of Congress had been passed nor agreement entered into providing for the allotment of the lands of the Cherokee Nation, and the date as of which the final roll was to be made had not been fixed.

The Court of Claims on February 15, 1896 (Rec., p. 60), refused to instruct the Commissioners who were appointed by the Secretary of the Interior to make the Kern-Clifton roll, holding that the instructions given to the Commissioners must be determined by him (Rec., p. 60), and on April 15, 1896 (31 Ct. Cls., 148), the Court of Claims refers to its previous ruling and overruled a motion for instructions, holding "that the matter of payment is exclusively within the jurisdiction of the Secretary of the Interior." The court

at that time referred to the act of March 2, 1895 (28 Stat., 910), which authorized the Secretary of the Interior to disburse moneys appropriated for Indians. We respectfully submit that the Court of Claims at that time did not construe that the Secretary of the Interior was making this roll as its agent, but that the matter of making the roll and the distribution of the money judgment was exclusively within the jurisdiction of the Secretary of the Interior. If the court was then correct, and the jurisdiction was exclusively within the Secretary of the Interior, then he was not the agent of the court. The act of March 2, 1895, referred to, authorized the Secretary of the Interior to make distribution of moneys appropriated, and by referring to this act as authority it conclusively shows that the court only had in mind the making of a roll for the distribution of the money judgment.

Was not Exclusive Jurisdiction for the Making of the Final Rolls of the Five Civilized Tribes, Including the Cherokee Freedmen Roll, Conferred Upon the Secretary of the Interior?

We submit that our contention that exclusive jurisdiction in citizenship matters was conferred upon the Secretary of the Interior is sustained by an examination of all the legislation enacted by Congress since jurisdiction to hear and determine applications for citizenship in the Five Civilized Tribes was conferred upon the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior, beginning with the act of June 10, 1896 (29 Stat., 321), which provided:

> "And said Commission shall also make a roll of freedmen entitled to citizenship in said tribes, and shall include their names in the lists of members to be filed with the Commissioner of Indian Affairs."

The act of June 7, 1897 (30 Stat., 83), continued the jurisdiction of the Commission in citizenship matters and—

> "*Provided*, That the words 'rolls of citizenship,' as used in the act of June tenth, eighteen hundred and ninety-six, * * * *shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the Nation*, * * * and any name appearing on such rolls and not confirmed by the act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such Commission."

Section 21 of the act of June 28, 1898 (30 Stat., 495), continued the jurisdiction of the Commission and provided:

> "The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, *shall alone constitute* the several tribes which they represent."

This provision alone is sufficient to indicate that it was the purpose of Congress to confer exclusive jurisdiction in citizenship matters upon the Commission to the Five Civilized Tribes, subject to the approval of the Secretary of the Interior.

The act of July 1, 1898 (30 Stat., 591), provided:

> "That said Commission shall continue to exercise all authority heretofore conferred on it by law."

Exactly the same provision was inserted in the act of March 1, 1899 (30 Stat., 939).

The same authority was continued in the act of May 31, 1900 (31 Stat., 221), with this additional provision:

> "But it shall not receive, consider, or make any record of any application of any person for enrollment as a member of any tribe in Indian Territory who has not been a recognized citizen thereof, and

duly and lawfully enrolled or admitted as such, and its refusal of such applications shall be *final* when approved by the Secretary of the Interior."

Clearly this was intended to confer exclusive jurisdiction upon the Commission, subject to the approval of the Secretary of the Interior.

The act of March 3, 1901 (31 Stat., 1073), provided:

> "The rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, *shall be final,* and the persons whose names are found thereon *shall alone constitute* the several tribes which they represent."

We insist that if the Commission to the Five Civilized Tribes had exclusive jurisdiction then, subject only to the approval of the Secretary of the Interior in citizenship matters, that Congress could not have intended that the court should retain power under the jurisdictional act of October 1, 1890, to direct how the final roll of citizens of the Cherokee Nation should be made.

Sections 25 to 31, inclusive, of the act of July 1, 1902 (32 Stat., 716), prescribe the method of making the roll of citizens of the Cherokee Nation in detail, and section 31 provided:

> "*No person* whose name does not appear upon the roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and *those whose names appear thereon shall participate* in the manner set forth in this act."

Section 22 conferred exclusive jurisdiction upon the Secretary in positive terms:

> "Exclusive jurisdiction is hereby conferred upon the Commissioner to the Five Civilized Tribes, under the direction of the Secretary of the Interior, to determine all matters relative to the appraisement and the allotment of lands."

We submit that no court has any jurisdiction or authority to compel the Commission to add any name to or to take any name from the roll.

The act of March 3, 1903 (32 Stat., 982), continued the authority of the Commission in the following language:

> "That said Commission shall exercise all the powers heretofore conferred upon it by Congress."

The same authority was continued in the act of April 21, 1904 (33 Stat., 189).

The authority of the Commission was further continued by a provision inserted in the Indian appropriation bill enacted in 1905.

Section 1 of the act of April 26, 1906 (34 Stat., 137), provides:

> "That after the approval of this act no person shall be enrolled as a citizen or freedman of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes of Indians in the Indian Territory, except as herein otherwise provided, unless application for enrollment was made prior to December first, nineteen hundred and five, and the records in charge of the Commissioner to the Five Civilized Tribes shall be conclusive evidence as to the fact of such application."

And section 2 provides:

> "That the rolls of the tribes affected by this act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, *and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date.*"

And section 3 of said act provides:

> "The roll of Cherokee freedmen shall include only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants, who were actual personal bona fide residents of the Cherokee Nation August eleventh, eighteen hun-

> dred and sixty-six, or who actually returned and established such residence in the Cherokee Nation on or before February eleventh, eighteen hundred and sixty-seven; but this provision shall not prevent the enrollment of any person who has heretofore made application to the Commission to the Five Civilized Tribes or its successor and has been adjudged entitled to enrollment by the Secretary of the Interior."

All of the above legislation is quoted, reviewed and referred to in the following decisions of this court:

The Stephens case, 174 U. S., 445; Cherokee Intermarriage case, 203 U. S., 76; Garfield *vs.* Goldsby, 211 U. S., 249; Fleming *vs.* McCurtain, 215 U. S., 415; Wallace *vs.* Adams, 204 U. S., 415; Turner *vs.* Fisher, decided December 4, 1911.

We have quoted from the legislation of Congress for each year from June 10, 1896, to April 26, 1906, a period of ten years, to show that it was the purpose of Congress to confer *exclusive jurisdiction* upon the Commission to the Five Civilized Tribes, subject to the approval of the Secretary of the Interior, to make the final rolls of the citizens of the Five Civilized Tribes. The several appropriation acts referred to show that millions of dollars have been appropriated to do this work, and the reports of the Commission filed as "Evidence for defendants" in this case (Rec., pp. 79–100), show that work was begun making the Cherokee rolls on May 11, 1900, and completed March 4, 1907. During these seven years each individual case was examined, the testimony of sworn witnesses taken, and written decisions rendered and forwarded to and approved or rejected by the Secretary of the Interior. From June 10, 1896, until March 4, 1907, exclusive jurisdiction of the Secretary of the Interior was not questioned.

This court said in the case of The United States *vs.* California & Oregon Land Company (148 U. S., 31):

> "Now, it is familiar law that when jurisdiction is delegated to any officer or tribunal his or its deter-

> mination is conclusive * * * The judgment of a special tribunal is final and conclusive when no provision is made for appeal to any other jurisdiction."

No provision was made for an appeal from the decision of the Secretary of the Interior in citizenship cases.

Riverside Oil Co. *vs.* Hitchcock, 190 U. S., 323.
Steel *vs.* St. L. Smelting Co., 106 U. S., 228.
Johnson *vs.* Towsley, 13 Wall., 83.
De Cambra *vs.* Rogers, 189 U. S., 121.

The Number of Applicants Made Exclusive Jurisdiction in Secretary of the Interior Necessary.

In the Cherokee Nation, including all classes, Cherokees by blood, freedmen, and intermarried whites, there were 53,724 applications for enrollment as citizens, and of these 41,798 were finally enrolled, leaving 11,926 denied (Rec., p. 100). A large number of applications was filed in each of the other Five Civilized Tribes. Congress was attempting to wind up the affairs of the tribes. It was necessary, therefore, to an expeditious settlement that the Commission to the Five Civilized Tribes, subject to the approval of the Secretary of the Interior, should have exclusive jurisdiction, uncontroiled by the supervision of any court.

Section 22 of the act of July 1, 1902, *supra*, provides:

> "Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior, to determine all matters relative to the appraisement and the allotment of lands."

And section 21 of said act, after directing that the allotment certificates issued by the Commission shall be conclusive evidence of the right of the allottee to any tract of land

(To be inserted immediately before new subject on page 80 of brief for Cherokee Nation.)

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 735.

CHEROKEE NATION ET AL.

vs.

MOSES WHITMIRE ET AL.

Legislative Construction That Exclusive Jurisdiction was Conferred upon the Secretary of the Interior in Citizenship Matters.

This court in the Marchie Tiger case (221 U. S., 286), at page 309, said:

> "When several acts of Congress are passed touching the same subject-matter, subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject. Cope *vs.* Cope, 137 U. S., 682; United States *vs.* Freeman, 3 How., 556."

See also Binns *vs.* United States (194 U. S., 486-496).

The House of Representatives on December 20, 1911, passed a Senate bill, No. 3842, amending a section of an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911, which was approved and became a law December 21, 1911 (Public, No. 50). This bill was introduced in both the Senate and the House of Representatives on December 18, 1911 (S., 3842, and H. R., 16282); passed the Senate December 19, 1911; was reported to and passed the House December 20, 1911, and was approved by the President December 21, 1911. The bill became a law within three days after it was introduced. Mr. Davenport, of Oklahoma, introduced the bill in the House, and he and Mr. Carter, also of Oklahoma, explained the urgency of passing the bill, and their remarks and the report upon the bill can be found on page 592 of the Congressional Record, 62d Cong., 2d Sess. It was explained in the debate that exclusive jurisdiction in citizenship and allotment matters had been conferred upon the Dawes Commission, with the right of appeal to the Secretary of the Interior; and that by an inadvertence jurisdiction in enrollment and citizenship matters by the act of March 3, 1911, was conferred upon the courts, and that this act would go into effect January 1, 1912. The debate shows that it was agreed by all members of the Judiciary Committee and the Committee on Indian Affairs that it was intended to permit exclusive jurisdiction in citizenship and allotment matters which affect the Five Civilized Tribes, the Quapaw and the Osage Nation of Indians, to be retained by the Secretary of the Interior, and not to be conferred upon the courts. Mr. Davenport, in explaining the urgency of enacting the bill, said:

> "The reason, I can explain in a minute, is because there has been a special forum created, commonly known as the Dawes Commission, to settle those questions, with the right of appeal to the Commissioner of Indian Affairs and then, in turn, to the Secretary of the Interior; and we want to re-enact the law as it stood at the time this code passed, March 3, 1911."

And in further explanation Mr. Carter said:

> "Now, we have had those matters wound up completely by the Dawes Commission, and this would permit suits to be brought in court about those matters which have already been adjudicated, citizenship cases, claims for enrollment, and so forth."

> "Mr. CAMPBELL: Will this open up that Pandora's box of citizenship cases that we have had at the door of the Committee on Indian Affairs for several years?
> "Mr. CARTER: Under the present law it will open it up on the 1st of January, when the new Code goes into effect. If this bill, amending the new Code and reinstating the old law, is passed, it will close those matters and we will not have that Pandora's box on our hands."

Subsequently, Mr. Davenport explained that he and Senator Owen and Mr. Carter had conferred with the Department of Justice, and that representatives of the Department had come "to the Committee on the Judiciary of the House and there it was agreed that this was a provision which should be enacted."

The bill was read the third time and unanimously passed. The report of the committee upon the bill follows the above discussion and shows conclusively that the members of Congress, some of whom have been members of the House during the time most of the citizenship legislation was enacted, all agree that it was intended by prior legislation to confer exclusive jurisdiction in citizenship and allotment matters upon the Dawes Commission, subject to the approval of the Secretary of the Interior.

WILLIAM W. HASTINGS,
National Attorney for the Cherokee Nation.

selected in allotment, directed the Indian agent to place the allottee in possession, and provided that—

> "The acts of the Indian agent hereunder shall not be controlled by the writ or process of any court."

Congress appreciated that if the action of the Commission and the Indian agent could be interfered with by the courts that the work of the Commission would never be concluded.

The Duties of the Commission in Enrollment Matters were Judicial.

The acts of Congress conferring exclusive jurisdiction upon the Commission, with the approval of the Secretary of the Interior, to make the final rolls of the Five Civilized Tribes hereinbefore referred to, the reports of the Commission showing the proceedings had in enrollment cases (Rec., p. 83), and the decisions of the Commission (Rec., p. 113), all show that the duties of the Commission in making the several rolls were judicial. The Commission was authorized to compel the attendance of witnesses, to send for persons and papers, to hear evidence, and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming citizenship in the Five Civilized Tribes. Every question, both of law and fact, had to be decided by the Commission, and the Commission rendered a judgment similar to judgments rendered in courts, which was final when approved by the Secretary of the Interior. We confidently assert that the decision of every court is in line with this view. *There is no decision to the contrary.*

Kimberlin Case.

In the case of *Kimberlin vs. Commission to the Five Civilized Tribes et al.* (104 Fed. Rep., 653) the Court of Appeals, Eighth Circuit, in discussing this very question, held:

> "Nevertheless, in the determination of citizenship of the parties who apply to them for membership in the Five Nations, they are *vested with judicial powers* by the acts of Congress. They have authority to compel the attendance of witnesses, to send for persons and papers, to hear evidence, 'to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship,' and above all they are empowered 'to hear and determine the application of all persons who apply to them for citizenship.' *This grant of power is plenary.* It vests the authority and imposes the duty upon this Commission *to hear and decide* every question of law and of fact which is material to the right of the applicant to enrollment as the citizen of a nation."

And the court further held:

> "Under these acts of Congress the Commission to the Five Civilized Tribes is a special tribunal, *vested with judicial power* to hear and determine the claims of all applicants to citizenship in the Five Tribes, and its enrollment or refusal to enroll the applicant in each particular case *constitutes its judgment in that cause.* In the case before us this tribunal has heard and determined the claim of the plaintiff. Whether its decision was right or wrong is immaterial in this court, and that question will not be considered. Congress saw fit to intrust to the *judicial discretion of the Commission* the determination of the application of the plaintiff in error, and of every question of law and of fact which that decision involved."

This is a case peculiarly in point. The plaintiff was an applicant for citizenship in the Chickasaw Nation, and it was a suit to compel the Commission to enroll her, contending that the duties of the Commission were "ministerial" and not "judicial."

The *Kimberlin case* was cited with approval by this court in the case of *Sac and Fox Indians vs. The United States* (45 C. Cls., 287), where, upon the authority of the *Kimberlin case,* the Court of Claims held that the law referred to—

> "gave the Secretary of the Interior discretionary powers in making the roll,"

and this opinion was confirmed by the Supreme Court on April 24, 1911 (220 U. S., 481).

The Court of Claims, in its opinion, on pages 95-96, indicates that the opinion in the *Kimberlin case* was modified by this court in the case of *Wallace vs. Adams* (204 U. S., 415); hence it is important to re-examine that case.

Wallace vs. Adams (204 U. S., 415)

The court, in the case of *Wallace vs. Adams* (143 Fed. Rep., 716), on the question as to whether the acts of the Commission were "ministerial" or "judicial," held:

> "The Commission, under the direction of the Secretary, constitutes a special tribunal *vested with the judicial power* to hear and determine the claims of all parties to allotment of these lands and to execute its judgment by the issue of the allotment certificates, which constitute conveyances of the right to the lands to the parties who it decides are entitled to the property."

And further on in the same opinion, the court said:

> "It is an adjudication by the special tribunal empowered to decide the question that the party to whom it issues is entitled to the land, and it is a conveyance of the right to this title to the allottee."

This opinion was affirmed by the Supreme Court in 204 U. S., 415. While the court in that case referred to the Territorial courts as being legislative courts, yet it nowhere indicated that the Territorial courts did not have conferred upon them judicial powers. Certainly no court has held that in citizenship matters the Commission was not clothed with judicial powers.

Buffington Case.

In the case of *Buffington et al. vs. Commission to the Five Civilized Tribes et al., supra,* an injunction was asked of the United States Court for the Northern District of the Indian Territory to prevent the Commission from enrolling freedmen applicants whose names were not upon the authenticated roll of 1880, or descendants of such persons, and Judge C. W. Raymond reviewed at length all of the acts of Congress relating to citizenship enacted prior to 1901, and the decree of the Court of Claims, now the subject of this controversy, *and held* that in making the Cherokee rolls the Commission was *invested with "judicial powers,"* and refused the injunction upon that ground. Upon this point the court held:

> "The special tribunal, *vested by Congress with judicial powers to determine every question of law and fact* which is material to the right of the applicant to enrollment as the citizen of a nation, cannot be controlled in the exercise of its *judicial* discretion either by mandamus or injunction" (p. 160).

In this case an application was made to the United States Court in the Indian Territory (now Oklahoma) for an injunction to prevent the Commission from enrolling any persons as freedmen of the Cherokee Nation whose names were not upon the Cherokee authenticated roll of 1880, or descendants of such. A demurrer to the petition was at first overruled by the court. Afterwards an answer was filed on

behalf of the Commission, setting forth that they were making a roll under the decree of the Court of Claims of date February 3, 1896, and that this decree did not require the Commission to be confined exclusively to the persons enrolled upon the Cherokee roll of 1880, but permitted the Commission to receive applications and to hear testimony of all persons claiming rights as freedmen citizens under the ninth article of the treaty of 1866, and the answer also stated that the Commission had exclusive jurisdiction, and that their judgment could not be controlled by a court. The court sustained this view, and therefore the question was properly raised before the court.

The latest expression of the Supreme Court upon this question was rendered April 24, 1911, in the case of *Sac and Fox Indians of Iowa vs. Sac and Fox Indians of Oklahoma,* appealed from this court. In that case the Supreme Court (220 U. S., 481) held:

> "The payments up to 1884 had the sanction of statutes. The act of 1884 no more created individual rights than did the act of 1852 and 1867. It confined its benefits to 'original Sacs and Foxes now in Iowa,' *and made the Secretary of the Interior the judge.*" (*Italics* are ours.)

Goldsby vs. Garfield.

In the case of *Goldsby vs. Garfield* (211 U. S., 249), and the companion case of *Allison vs. Garfield,* which is a Cherokee case, the name of the applicant, Allison, was placed upon a list by the Commission to the Five Civilized Tribes and forwarded to the Secretary of the Interior for approval, and was approved by the Secretary. Without notice to the applicants their names were stricken from the list. The only point in this case decided by the court in the Goldsby case was whether the Secretary, after having finally approved a list upon which appeared the applicant's name, and which became a part and parcel of the final roll of the tribe, could,

without notice to the applicant, strike his name therefrom. This court decided that he could not, and held that a mandamus would lie to compel the Secretary not to enroll the applicant, Goldsby, but to eliminate the red line he had caused to be run through the name, and to erase the notation on the margin of the roll book which had the effect to take his name off the roll, and when this was done it left the name of the applicant upon the roll in the same condition as it was before the Secretary took action without notice to the applicant; in other words, left the name upon the roll as it was before.

In the case at bar the names of petitioners were not on list forwarded to and approved by the Secretary of the Interior as provided by section 29 of the act of July 1, 1902, as were the names of Goldsby and Allison. The court would not have ordered them enrolled if they had been denied as were petitioners.

Turner Case (31 D. C. App., 332).

The Court of Appeals for the District of Columbia, in the case of Turner *et al., vs.* The Secretary of the Interior (31 D. C. App., 332), refused to issue a mandamus to compel the Secretary of the Interior to restore names of relators to the Creek Freedmen roll, holding in effect that the Secretary of the Interior upon proof of fraud and with notice had jurisdiction over enrollment matters until March 4, 1907, the date when the roll was to be finally closed under section 2 of the act of April 26, 1906, *supra.* This court, while holding that a few hours' notice to the attorney for relators was insufficient, affirmed the decision December 4, 1911.

Lowe Case (34 D. C. App., 70).

Lillie Lowe claimed to be a freedman citizen of the Cherokee Nation through her mother, Mary Robbins or Mary Rogers. With her mother and her minor children she made ap-

plication to the Commission to be enrolled as freedmen citizens of the Cherokee Nation, and they were enrolled and their names placed upon a partial list with others and the same forwarded to the Secretary of the Interior and approved by him under section 29 of the act of July 1, 1902. Thereafter her brother, James Rogers, applied to the Commission to be enrolled; additional testimony was introduced in his case, and his application to be enrolled was rejected, and the decision rejecting him was forwarded to the Secretary of the Interior for approval. The Secretary's attention, having been invited to the enrollment of Lillie Lowe, and the decision of the Commission rejecting James Rogers, both claiming through the same mother, Mary Robbins or Rogers, the Secretary remanded the case of James Rogers and also the case of Lillie Lowe and family, directed that they be consolidated, that additional testimony be taken, and that the same be readjudicated. The case was remanded and consolidated, as directed by the Secretary. Notice was given to all parties and additional testimony taken and a new decision prepared rejecting all of the applicants, and this decision was approved by the Secretary of the Interior. *The names of all applicants appeared upon the Kern-Clifton roll.* The name of Lillie Lowe and the members of her family were by the Secretary of the Interior stricken from the partial list theretofore approved. A petition for a writ of mandamus was brought to compel the Secretary of the Interior to cancel the lines erasing the name of Lillie Lowe and the members of her family from this roll, upon the same grounds that had been alleged in the *Goldsby case.* The Court of Appeals for the district, however, decided that the Secretary of the Interior had jurisdiction over the rolls until March 4, 1907, like a court had control over its judgments until the end of the court term, and that the Secretary, *with notice,* could cause any case to be reopened and readjudicated prior to March 4, 1907. In other words, the only distinction between the *Goldsby case* and the *Lowe case* is that in the *Goldsby case* the Secretary of the

Interior gave no notice to the applicant, and the Supreme Court held that notice must be given; whereas in the *Lowe case* notice was given the applicant and the action of the Secretary was sustained in that case.

No allegation of fraud was made in the *Lowe case,* it was *not remanded upon proof of fraud,* but a rehearing was ordered by the Secretary upon newly discovered evidence.

Secretary Authorized to Review His Own Decisions Until March 4, 1907.

We insist, upon the authority of the *Lowe case,* that the Secretary of the Interior had control over all decisions in citizenship cases until March 4, 1907. Section 2 of the act of April 26, 1906 (34 Stat., 137), required that the roll be fully completed on or before March 4, 1907, and also provided that the Secretary of the Interior should have no jurisdiction to approve the enrollment of anyone after that date. Upon notice, however, we insist that the Secretary of the Interior could, up to that date, review any former decision. If that be true, and if it be also true, as we have heretofore contended, that the Kern-Clifton roll was made under the direction of the Secretary of the Interior and not under the direction of the court, and was therefore not a "court's roll," then why would not the Secretary be authorized to review his own decision, whether rendered when the Kern-Clifton roll was being made, or upon appeals from decisions of the Commission to the Five Civilized Tribes?

It will be observed again that in the *Lowe case, supra,* the court held:

> "In other words, the provision enabled the Commission to forward its findings in installments."
>
> "It is, we think, quite clear that Congress did not contemplate that the rolls should be deemed complete and beyond the control of the Secretary until lists embracing the names of all those lawfully entitled to enrollment had been submitted to and passed upon by him. Until the roll was complete, we think

> it was the intention of Congress that he should have jurisdiction and control over every part of it. It is unreasonable to suppose that Congress in merely providing that the Commission might, from time to time, forward to the Secretary lists containing the names of those thought to be entitled to enrollment intended to deprive the Secretary, after he had once acted upon a given application, of further authority over it. Rather, we think, that the Secretary's authority continued until another roll was complete."

And further on in the opinion the court said:

> "We rule that the Secretary had the same power over the roll until terminated by statutory limitations that a court has over its judgments."

And again the court said:

> "After its first adjudication the Commission discovered new evidence indicating that relators were not entitled to enrollment. Upon this evidence being brought to the attention of the Secretary, a rehearing was directed. Due notice was given and the rehearing, in which the relators participated, was had. This rehearing resulted in the setting aside of the prior adjudication and the striking of relators' names from the rolls. There is no contention that every requirement of due process of law was not observed. We therefore rule that the Secretary's authority as to these enrollments was not exhausted when he acted upon the records first submitted to him, and that he had power to correct the error discovered."

Now, it will be noted in the *Lowe case* that the Secretary ordered a rehearing, not upon proof of fraud, but upon the ground of newly discovered evidence.

The Court of Claims in its opinion in this case, on page 229, indicated that the Kern-Clifton roll was not conclusive, when it said:

> "The Kern-Clifton roll which resulted was necessarily before the Dawes Commission, subject to cor-

rection for fraud or mistake in the matter of the identity of freedmen."

In other words, if the Secretary found that a mistake had been made, he could correct it on or before March 4, 1907. We insist that that is exactly what the Secretary of the Interior has done in the case of each applicant rejected. They all applied to him, they all had notice, they all submitted their testimony, they all had the opportunity of being represented by counsel, to cross-examine witnesses introduced against their right to enrollment, copies of decisions of the Commission were furnished them, and the Commission, after exhaustively examining each case, held that the Kern-Clifton Commission had made a mistake in enrolling each of the petitioners denied, and denied them, and their decision was approved by the Secretary of the Interior. In other words, the Secretary of the Interior corrected his mistake by eliminating from the roll those whom he found upon a further and a more exhaustive investigation were not entitled to be enrolled as freedmen citizens under the decree of the Court of Claims.

Case of Ligon vs. Johnston (164 Fed., 670).

Bettie Ligon, on behalf of herself and several hundred others alleged to be similarly situated and to be of Choctaw and Chickasaw Indian descent and members of those tribes, brought suit in the United States court in the Indian Territory (now Oklahoma) against the governors of the respective tribes and the Secretary of the Interior seeking to enjoin the distribution of the funds and the disposition of the unallotted lands until complainants are placed upon the rolls as citizens by blood, and to receive allotments as such and to participate with other citizens in the funds.

They claimed they were erroneously enrolled as freedmen, and should have been enrolled as citizens by blood and entitled to share as such, and should be placed upon that roll.

The real purpose of the proceeding was to have a decree entered adjudging complainants entitled to be enrolled as citizens by blood of the Choctaw and Chickasaw Nations instead of as freedmen. Upon the question of the finality of the rolls and the exclusiveness of the jurisdiction of the Secretary of the Interior the circuit court held:

> "A Commission, generally called the 'Dawes Commission,' was created by the act of March 3, 1893 (c. 209, 27 Stat., 645), and by a series of subsequent acts and by agreements with the tribes it was intrusted with the task, under the direction of the Secretary of the Interior. The Commission was directed to make correct rolls of Choctaw and Chickasaw citizens by blood and also correct rolls of the freedmen of those tribes and descendants of freedmen who were entitled to 40 acres of land under the treaty of 1866. The rolls so made were to be final when approved by the Secretary of the Interior, and those whose names appeared thereon could alone participate in the distribution of tribal property. The act of April 26, 1906 (c. 1875, 34 Stat., 137; U. S. Comp. St. Supp. 1907, p. 867), providing for the final disposition of the affairs of the tribes, required the rolls to be fully completed by March 4, 1907, and deprived the Secretary of the Interior of jurisdiction to approve the enrollment of any person after that date. The rolls were completed and the time for change expired."

After discussing the power of Congress over the disposition of tribal property, upon the question of the finality of the roll, the circuit court held that exclusive jurisdiction was conferred upon the Secretary of the Interior, and that his decision was not the subject for the intervention of the courts, in the following language:

> "Whether complainants should be enrolled as citizens of the Indian nations is a political or administrative question, and none the less so because upon its determination depends the measure of their participation in the tribal property. (*Wallace vs.*

> *Adams*, 74 C. C. A., 540; 143 Fed., 716; *Id.*, 204 U. S., 415; 27 Sup. Ct., 363; 51 L. Ed., 547.) For many years the power to determine who were and who were not citizens of these tribes was left exclusively to the tribal authorities; names were added to and stricken from the rolls at will; and when Congress, to end the arbitrary practice, intrusted the power to the administrative officers of the Government, who had no private interests to subserve, it did not change that which was of a purely political character into a subject matter for the intervention of the courts (*West vs. Hitchcock*, 205 U. S., 80; 27 Sup. Ct., 423; 51 L. Ed., 718)."

This has been our contention in this case: That Congress intended and did by the various acts referred to in the above opinion confer exclusive jurisdiction upon the Secretary of the Interior to make the final roll of citizens of the Five Civilized Tribes, and that he has made said roll and that the same is final and not subject to review by the courts.

The appeal in the above case was dismissed by this court December 11, 1911, leaving the above decision as the final expression of the court.

Case of Fleming vs. McCurtain (215 U. S., 56).

In the case of *Fleming et al. vs. McCurtain et al., supra*, suit was originally filed in the United States Court for the Eastern District of Oklahoma on behalf of J. E. Fleming, claiming to represent about 13,000 people, against the governors of the Choctaw and Chickasaw Nations and the Secretary of the Interior *et al.*, the main purpose of which was to have a decree entered under which the Secretary of the Interior would be compelled to enroll complainants and to permit them to share in the distribution of the common property of the tribes. The trial court, in commenting upon the relief sought, said:

> "This is the main relief sought by the bill. All other relief prayed is but incidental thereto. Such

> a decree could only be based upon a finding that complainants are entitled to enrollment, a question, as we have seen, not within the province of this court."

The trial court held, in sustaining the demurrer to the petition, that exclusive jurisdiction in the making of the rolls of the citizens of the Five Civilized Tribes was conferred upon the Secretary of the Interior, and, second, that the court was without jurisdiction to review the decision of the Secretary of the Interior.

The Supreme Court upon appeal in this case exhaustively reviewed the legislation of Congress with reference to citizenship in the Five Civilized Tribes, and with reference to the claimants' petition the court held:

> "It refers to the act of June 28, 1898 (c. 517, 30 Stat., 495), and the earlier statutes leading up to it, which established a Commission, ordered it to prepare correct rolls of citizenship, and provided by section 21 of the act of 1898 that the rolls so made, when approved by the Secretary of the Interior, should be final. (See also acts of Mar. 3, 1901, c. 832, 31 Stat., 1058, 1077; Apr. 26, 1906, c. 1876, 34 Stat., 137.) By section 11 a division was to be made among the 'citizens' of the tribes according to the rolls, and by section 12 the allottees were to have undisturbed possession when the report of the allotments had been made to the Secretary of the Interior and confirmed by him. By section 29 an agreement with the Choctaws and Chickasaws on the matter was ratified, and by the act of July 1, 1902 (c. 1362, 32 Stat., 641), a further agreement was ratified, which again excluded all except those whose names were upon the roll. (Article 35.)
>
> "The bill charges that these agreements, as well as a part of the act of 1898, were void as excluding some of the plaintiffs who were not residents of the Nation on June 28, 1898, and as not having been approved by the class, or a majority of the class, alleged to have been designated by the treaty and patent that we have discussed. The bill goes on to allege that rolls were prepared by the Commission

> and approved by the Secretary, within the time allowed by the statutes (act of April 26, 1906, c. 1876, sec. 2, 34 Stat., 137), and that the time has expired, but the rolls were not made in conformity to the act of 1898, and are not correct, but fraudulent in various particulars set forth. But these allegations make out no case for the plaintiffs."

In other words, the court held that the names of complainants were not upon the final roll as approved by the Secretary of the Interior, and that the time for the making of said roll had expired; and sustained the action of the trial court in dismissing the petition for the reason that the court had no jurisdiction to review the action of the Secretary of the Interior. In concluding its opinion, the court in the case of *Fleming et al. vs. McCurtain et al.*, speaking of complainants, said:

> "They disclose that their names are not upon the rolls and that the decision of the Secretary of the Interior has been against them and they show no reason for our not accepting the rolls and decision as final according to the terms of the distributing acts. (See *West vs. Hitchcock*, 205 U. S. 80; *Garfield vs. Goldsby*, 211 U. S., 249, 259.)

Enrollment by the Secretary of the Interior Not Reviewable.

The real relief sought to be obtained through the supplemental petition filed herein is to mandamus the Secretary of the Interior to place the names of petitioners upon the final roll of citizens of the Cherokee Nation, so that they may participate in the allotment of the lands of the tribe and in the distribution of the money.

We have shown that under the legislation cited herein the rolls when approved by the Secretary of the Interior were to be final. There was to be no appeal from his decision, and the rolls were to be completed on or before March 4,

1907. In the case of *West vs. Hitchcock* (205 U. S., 80) the court refused to issue a mandamus directing the Secretary of the Interior to enroll the applicant, and in the decision held that—

> "In the absence of any indication in the act to allow an appeal to the courts for applicants who are dissatisfied, mandamus will not issue to require the Secretary to approve the selection of one claiming to be an adopted member of the tribe but whose application the Secretary has denied."

And the court further held:

> "Where the Secretary of the Interior has authority to pass on the right of one claiming to be a member of a band of Indians to select land under an agreement ratified by an act of Congress, *his jurisdiction does not depend upon his decision being right.*"

It is conceded in this case that all of the applicants applied to the Commission to the Five Civilized Tribes, introduced their testimony, written opinions were rendered in each case, that each separate case was approved by the Secretary of the Interior, that those adjudged to be entitled were placed upon the final roll as freedmen citizens of the Cherokee Nation, and that this roll was approved by the Secretary of the Interior on or before March 4, 1907. We submit that the decision of the Secretary is final, and "his jurisdiction does not depend upon his decision being right" (*West vs. Hitchcock, supra*).

In the case of De Cambra *vs.* Rogers, this court, speaking through Mr. Justice Brewer, said:

> "It is really unnecessary to say that when a decision has been made by the Secretary of the Interior, courts will not entertain an inquiry as to the extent of his investigation and knowledge of the points decided or as to the methods by which he reached his determination."
>
> 189 U. S., 119.

This court held in a memorandum opinion December 4, 1911, in the case of Turner *et al. vs.* The Secretary of the Interior:

> "But mandamus is not a writ of right. It issues to remedy a wrong, not to promote one, and will not be granted in aid of those who do not come into court with clean hands."

It is conceded that all the petitioners in this case had an opportunity to present each of their cases from May 11, 1900, to March 4, 1907, were represented by counsel, that all questions, both of law and fact, were fully presented and considered, and that upon appeal the Secretary of the Interior rendered a decision in each case holding that the petitioners were not entitled to be enrolled under the decree of February 3, 1896.

We submit that petitioners are not entitled to be enrolled, "do not come into court with clean hands," and that this court, under the decision of the Turner *vs.* Fisher case, *supra,* will not issue a mandamus directing the enrollment of petitioners "to promote" a wrong.

The act of July 1, 1902, *supra,* and the several other acts of Congress herein cited and referred to, invested the Secretary of the Interior with jurisdiction over enrollment matters, and authorized him to approve the final rolls containing the names of all persons he found, upon a full investigation of all the facts and law pertaining thereto, to be entitled to enrollment, and his decision was to be final. The Secretary having performed that duty, pursuant to authority vested in him by law, his decision is not open to review.

Steel *vs.* St. L. Smelting Co., 106 U. S., 228.
Johnson *vs.* Towsley, 13 Wall, 83.

As said by this court in Riverside Oil Co., *vs.* Hitchcock, 190 U. S., 323:

> "Whether he decided right or wrong is not the question. Having jurisdiction to decide at all, he

had necessarily jurisdiction and it was his duty to decide as he thought the law was, and the courts have no power whatever under those circumstances to review his determination by mandamus or injunction. The court has no general supervisory power over the officers of the Land Department by which to control their decisions upon questions within their jurisdiction."

Daniels *vs.* Tearney, 102 U. S., 418.
Foltz *vs.* St. L. R., 19 U. S. App., 581,

In the case of *Buffington vs. The Commission to the Five Civilized Tribes,* the court refused to enjoin the Commission, and upon this point said:

"This special tribunal, vested by Congress with judicial powers to determine every question of law and fact which is material to the right of the applicant to enrollment as a citizen of the nation, can not be controlled in the exercise of its judicial discretion either by mandamus or injunction."

The right to issue the writ of mandamus was exhaustively reviewed in the case of *Kimberlin vs. Commission to the Five Civilized Tribes, supra,* where it was held that—

"The writ of mandamus issues to compel the performance of a plain duty imposed by law. Where that duty is the exercise of judgment and of discretion by an officer in the decision of a question of law or fact, or both, it may issue to compel a decision, but it may not command him in what particular way that decision should be rendered. When a question has been decided by the officers to whose judgment or discretion the law has been entrusted for its determination, the writ of mandamus may not issue to review or reverse that decision, or to compel another."

A great many authorities are collected in that decision. As heretofore shown in the *Fleming case, supra,* the trial court said that the main purpose for which the decree was

sought was to compel the enrollment of complainants, and used the following language:

> "This is the main relief sought by the appeal. All other relief prayed is but incidental thereto. Such a decree could only be based upon a finding that complainants are entitled to enrollment, a question, as we have seen, not within the province of this court."

That is exactly what is sought for in this decree, namely, to compel the Secretary to enroll petitioners. This court said in the *Fleming case* that this could not be done, and held that exclusive jurisdiction was conferred upon the Secretary of the Interior to make the roll.

The same relief was prayed for in the *Ligon case, supra,* and the court held that the action of the Secretary of the Interior in refusing to enroll the applicants was not the subject of review by a court.

The Court of Claims had no authority to grant the relief prayed for in the supplemental petition. We have heretofore (pp. 26-29) shown that that court had no general jurisdiction to issue a writ of mandamus or injunction except to enforce a money judgment and that the jurisdictional act of October 1, 1890 (26 Stat., 636), under which this suit was originally brought, conferred none, and that the money judgment awarded was disbursed in 1897 (*United States vs. Jones,* 131 U. S., 1).

Error of Decree as to Date of Enrollment.

The decree entered in this case February 20, 1911 (Rec., p. 216), not only requires the Secretary of the Interior to make the Cherokee freedmen roll, using the Kern-Clifton roll as a basis, but it requires that the roll be made down to and including descendants "living on the fourth of March, nineteen hundred and seven." Section 25 of the act of July 1, 1902, declares (32 Stat., 716) "that the roll shall be made as of date September 1, 1902." Section 2 of the act

of April 26, 1906 (34 Stat., 137), as amended by the act of June 21, 1906 (34 Stat., 325), provides for the enrollment of minor children living on March 4, 1906. Thus it will be seen that the decree in this case provides for the enrollment of those living on March 4, 1907, whereas there is no provision of law for the enrollment of any citizens born and living after March 4, 1906. The confusion perhaps arose over the provision in section 2 of the act of April 26, 1906, which provided that the rolls of the tribes affected by this act shall be fully completed on or before the 4th day of March, 1907. This gave the Secretary jurisdiction to complete the rolls on or before March 4, 1907, but the rolls were made as of date March 4, 1906, and there is no provision of law authorizing the enrollment of any one born after March 4, 1906.

Rolls Finally Closed March 4, 1907.

Congress, beginning with the act of June 10, 1896, and continuing through the acts of June 28, 1898, July 1, 1902, and April 26, 1906, have shown their purpose to have the affairs of the Five Civilized Tribes administered upon under the direction and supervision of the Interior Department. The roll of citizens has been made and approved under the several acts referred to. Section 2 of the act of April 26, 1906 (34 Stat., 137), provides:

> "That the rolls of the tribes affected by this act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior *shall have no jurisdiction to approve the enrollment of any person after said date.*"

And the rolls were completed and approved by the Secretary of the Interior on or before March 4, 1907.

The supplemental petition was not filed in this case until September 30, 1907, although the freedmen whose names were on the Kern-Clifton roll had made application to the

Commission to the Five Civilized Tribes for enrollment as early as 1900, and some of them were rejected. The freedmen knew what construction the Department was placing on section 21 of the act of June 28, 1898, *supra,* section 27 of the act of July 1, 1902, *supra,* and section 3 of the act of April 26, 1906, *supra,* and acquiesced in that construction for more than seven years.

Neither the court nor the Department under existing law since the enactment of section 2 of the act of April 26, 1906, *supra,* providing that the Secretary of the Interior should have no jurisdiction to approve the enrollment of anyone after March 4, 1907, has any authority to order the enrollment of anyone upon the roll of the Cherokee Nation. *Congress alone by legislation could authorize it, and this has not been done.*

> "However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of congressional legislation."
>
> Ballinger *vs.* Frost (216 U. S., 240).

Decree of the Court of Claims dated February 20, 1911, does Not Conform to the Relief Prayed for in the Supplemental Petition.

The supplemental petition filed on behalf of complainants herein, after reciting certain statutes and the decree of the Court of Claims dated February 3, 1896, avers that the names of all petitioners are on the Kern-Clifton roll, erroneously stating "most of whom had also been on the authenticated roll of 1880" (*the report of Commissioner Wright (Rec., p. 100) fails to show the name of a single petitioner on 1880 roll*), and prays the court to pass a decree in substance as follows:

> "(*a*) Declaring the action of the said Dawes Commission and the Secretary of the Interior whereby the names of said freedmen were excluded from the roll

and citizenship of the Cherokee Nation be declared to be unlawful."

This cannot, of course, be granted, because we have shown (1) that the roll has been made in accordance with law, and (2) because it is now closed.

> "(*b*) Enjoining and prohibiting the defandents, * * * from making any discrimination between said freedmen and other citizens of the Cherokee Nation in the allotment of lands and distribution of the said property and assets of said Nation."

The report of the commissioner in charge of the work of the allotment of the lands of the Cherokee Nation (Rec., pp. 100-107) shows that there is no discrimination against any recognized and enrolled freedmen citizens of the Cherokee Nation; hence this relief is unnecessarily sought even if the court had jurisdiction.

> "(*c*) Enjoining the said defendants, and particularly the United States acting through the Secretary of the Interior, from further disturbing said freedmen in the possession and occupation of their said homes and improvements."

The report of the commissioner shows (Rec., p. 107) that the rejected freedmen are not being evicted from the possession of any improvements or lands, presumably because the Department is awaiting a decision of the court upon this supplemental petition.

Section 21 of the act of July 1, 1902 (32 Stat., 716), requires the Secretary of the Interior, acting through the United States Indian agent, to place all allottees in possession of their respective allotments, and provides that the action of the Indian agent "shall not be controlled by the writ or process of any court." Said section 21 is as follows:

> "Allotment certificates issued by the Dawes Commission shall be conclusive evidence of the right of an allottee to the tract of land described therein, and

> the United States Indian agent for the Union Agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to him, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court."

The relief prayed for in the above paragraph cannot be granted because of this section.

> "(*d*) And further enjoining upon the said defendant, the United States, acting through the Secretary of the Interior, to reinstate such of said freedmen as have heretofore been ousted from the occupancy and possession of their said homes and improvements."

If, as the report of the commissioner shows (Rec., p. 107), no rejected freedmen have been ousted, no such relief could be ordered by the court.

It will be seen that the supplemental petition does not ask for a decree to "direct," or "enjoin," or "mandamus" the Secretary of the Interior to place names of any freedmen on the final Cherokee roll. It only asks the court to construe the act of the Secretary of the Interior in excluding petitioners as "unlawful," but asks no affirmative relief. Instead of following the prayer of the supplemental petition the court decreed:

> "That the Secretary of the Interior be, and he hereby is, enjoined and directed to place upon the roll of citizens of the Cherokee Nation, authorized and directed by the acts of June 28, 1898; July 1, 1902; and April 26, 1906, the names of as many of said freedmen and free colored persons and the names of as many of their descendants, born after the third day of May, 1894, and before the fourth day of March, 1907, as may have been living on the third day of March, 1897."

And also directed the Secretary of the Interior—

> "To allot to each of them proportionate share of the lands of said Nation."

No such affirmative relief is prayed for. For the reasons set forth at length herein it is insisted:

First. That the relief prayed for cannot be granted;

Second. That it was error for the Court of Claims to enter the decree of February 20, 1911, and

Third. That the supplemental petition should be dismissed.

Conclusion.

It is therefore respectfully submitted:

First. That the Court of Claims had no jurisdiction to reopen the decree of February 3, 1896, and the supplemental petition filed herein should, therefore, for that reason be dismissed.

Second. If the court, however, should hold that the Court of Claims had jurisdiction, then we submit that the relief prayed for cannot be granted—

(*a*) Because Congress has plenary power to prescribe the method of making the rolls of citizenship of the Cherokee Nation, and can change the method prescribed at any time before final allotments of land have been made.

(*b*) Congress did not by section 21 of the act of June 28, 1898, *supra*, nor by section 27 of the act of July 1, 1902, *supra*, nor by section 3 of the act of April 26, 1906, *supra*, confirm the Kern-Clifton roll, *but intended that a new roll of freedmen citizens of the Cherokee Nation* should be made under the supervision of the Secretary of the Interior.

(*c*) The Court of Claims since the closing of the roll on March 4, 1907, *is without jurisdiction to reopen* the decree of February 3, 1896, or to grant the relief ordering the freedmen enrolled on the Kern-Clifton roll to be enrolled on the present Cherokee tribal roll as prayed for in the supplemental petition.

(*d*) The Court of Claims has no jurisdiction to grant injunctive relief.

(*e*) The petitioners are guilty of such laches as not to entitle them to relief.

WILLIAM W. HASTINGS,
National Attorney for the Cherokee Nation.

APPENDIX.

Pertinent Parts of Acts and Treaties for Convenient Reference. (*Italics our own.*)

TREATY OF JULY 19, 1866 (14 STAT., 799).

That all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees.

ACT OF OCTOBER 1, 1890 (26 STAT., 636).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That full jurisdiction is hereby conferred upon the Court of Claims, subject to an appeal to the Supreme Court of the United States, as in other cases, to hear *and determine* what are the just rights in law or in equity of the Shawnee and Delaware Indians who are settled and incorporated into the Cherokee Nation, Indian Territory, east of ninety-six degrees west longitude, under the provisions of article fifteen of the treaty of July nineteenth, eighteen hundred and sixty-six, made by and between the United States and the Cherokee Nation and articles of agreement made by and between the Cherokee Nation and the Shawnee Indians June seventh, eighteen hundred and sixty-nine, approved by the President June ninth, eighteen hundred and sixty-nine and articles of agreement made with the Delaware Indians April eighth, eighteen hundred and sixty-seven, *and also of the Cherokee*

freedmen who are settled and located in the Cherokee Nation under the provisions and stipulations of article nine of the aforesaid treaty of 1866 in respect to the subject-matter herein provided for.

SEC. 2. That the said Shawnees, Delawares, and freedmen shall have a right, either separately or jointly, to begin and prosecute suits against the Cherokee Nation and the United States Government *to recover from the Cherokee Nation all moneys* due either in law or equity and unpaid to the said Shawnees, Delawares, or freedmen which the Cherokee Nation have before paid out, or may hereafter pay, per capita, in the Cherokee Nation, and which was, or may be, refused to or neglected to be paid to the said Shawnees, Delawares, or freedmen, by the Cherokee Nation, *out of any money or funds* which have been, or may be, paid into the treasury of, or in any way have come, or may come, into the possession of the Cherokee Nation, Indian Territory, *derived from* the sale, leasing, or rent for grazing purposes on Cherokee lands west of the ninety-sixth degree of west longitude, and which have been, or may be, appropriated and directed to be paid out per capita by the acts passed by the Cherokee council, and for all moneys, lands, and rights which shall appear to be due to the said Shawnees, Delawares, or freedmen under the provisions of the aforesaid articles of the treaty and articles of agreement.

SEC. 3. That the said suit or suits may be brought in the name of the principal chief or chiefs of the said Shawnee and Delaware Indians, and for the freedmen and in their behalf and for their use in the name of some person as their trustee, to be selected by them, with the approval of the Secretary of the Interior. And the exercise of such jurisdiction shall not be barred by any lapse of time heretofore, nor shall the rights of such Indians be impaired by any acts passed and approved by the Cherokee national council. Suits may be instituted within twelve months after the passage of this act, and the law and practice and rules of procedure in such

courts shall be the practice and law in these cases; and copies of petitions filed in the case at the commencement of the suit shall be served upon the Attorney General of the United States and on the principal chief in the Cherokee Nation by the marshal of the District Court for the Indian Territory; and that the costs of said suits shall be apportioned between the United States and the other parties to such suits as to said court law and equity shall require. The Attorney General shall designate and appoint from the Department of Justice a person who is competent to defend the said Cherokee Nation and the United States. And the said Shawnees, Delawares, and freedmen may be represented by attorneys and counsel. And the court is hereby *authorized to decree the amount of compensation* of such attorneys and counsel fees, *not to exceed ten per centum* of the *amount recovered,* and order the same to be paid to the attorneys and counsel of the said Shawnees, Delawares, and freedmen; *and all judgments for any sum or sums of money which may be ordered or decreed by such court* in favor of the Shawnees, Delawares, or freedmen, and against the Cherokee Nation, *shall be enforced by the said court or courts against the said Cherokee Nation by execution, mandamus, or in any other way which the said court may see fit.*

ACT OF JUNE 10, 1896 (29 STAT., 321).

And said Commission shall also make a roll of freedmen entitled to citizenship in said tribes, and shall include their names in the lists of members to be filed with the Commissioner of Indian Affairs.

ACT OF JUNE 7, 1897 (30 STAT., 83).

Provided, That the words "rolls of citizenship," as used in the act of June tenth, eighteen hundred and ninety-six, * * * *shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council*

of the Nation, * * * and any name appearing on such rolls and not confirmed by the act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such Commission.

ACT OF JUNE 28, 1898 (30 STAT., 495).

SEC. 21. That in making rolls of citizenship of the several tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take the roll of Cherokee citizens of eighteen hundred and eighty (not including freedmen) as the only roll intended to be confirmed by this and preceding acts of Congress and to enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll to persons whose names are found thereon; and all persons who have been enrolled by the tribal authorities who have heretofore made permanent settlement in the Cherokee Nation whose parents, by reason of their Cherokee blood, have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted; and they shall investigate the rights of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to citizenship under Cherokee laws.

It shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six.

Said Commission is authorized and directed to *make correct rolls* of the citizens by blood of all the other tribes, *eliminating from the tribal rolls* such names as may have been placed thereon by fraud or *without authority of law, enrolling such only as may have lawful right thereto,* and their descendants born since such rolls were made, with such

intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and the laws of said tribes.

Said Commission shall have authority to determine the identity of Choctaw Indians claiming rights in the Choctaw lands under article fourteen of the treaty between the United States and the Choctaw Nation, concluded September twenty-seventh, eighteen hundred and thirty, and to that end may administer oaths, examine witnesses, and perform all other acts necessary thereto, and make report to the Secretary of the Interior.

The roll of Creek freedmen made by J. W. Dunn, under authority of the United States, prior to March fourteenth, eighteen hundred and sixty-seven, is hereby confirmed, and said Commission is directed to enroll all persons now living whose names are found on said rolls, and all descendants born since the date of said roll to persons whose names are found thereon, with such other persons of African descent as may have been rightfully admitted by the lawful authorities of the Creek Nation.

It shall make a correct roll of all Choctaw freedmen entitled to citizenship under the treaties and laws of the Choctaw Nation, and all their descendants born to them since the date of the treaty.

It shall make a correct roll of Chickasaw freedmen entitled to any rights or benefits under the treaty made in eighteen hundred and sixty-six between the United States and the Choctaw and Chickasaw tribes and their descendants born to them since the date of said treaty, and forty acres of land, including their present residences and improvements, shall be allotted to each, to be selected, held and used by them until their rights under said treaty shall be determined in such manner as shall be hereafter provided by Congress.

The several tribes may, by agreement, determine the right of persons who for any reason may claim citizenship in two

or more tribes, and to allotment of lands and distribution of moneys belonging to each tribe; but if no such agreement be made, then such claimant shall be entitled to such rights in one tribe only, and may elect in which tribe he will take such right; but if he fail or refuse to make such selection in due time, he shall be enrolled in the tribe with whom he has resided, and there be given such allotment and distributions, and not elsewhere.

No person shall be enrolled who has not heretofore removed to and in good faith settled in the Nation in which he claims citizenship:

Provided, however, That nothing contained in this act shall be so construed as to militate against any rights or privileges which the Mississippi Choctaws may have under the laws of or the treaties with the United States.

Said Commission shall make such rolls descriptive of the persons thereon, so that they may be thereby identified, and it is authorized to take a census of each of said tribes, *or to adopt any other means by them deemed necessary to enable them to make such rolls.* They shall have access to all rolls and records of the several tribes, and the United States Court in Indian Territory shall have jurisdiction to compel the officers of the tribal government as custodians of such rolls and records to deliver same to said Commission, and on their refusal or failure to do so to punish them as for contempt; as also to require all citizens of said tribes, and persons who should be so enrolled, to appear before said Commission for enrollment, at such time and places as may be fixed by said Commission, and to enforce obedience of all others concerned, so far as the same may be necessary, to enable said Commission to make rolls as herein required, and to punish any one who may in any manner or by any means obstruct said work.

The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to

them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.

The members of said Commission shall, in performing all duties required of them by law, have *authority to administer oaths, examine witnesses,* and *send for persons and papers;* and any person who shall wilfully and knowingly make any false affidavit or oath to any material fact or matter before any member of said Commission, or before any other officer authorized to administer oaths, to any affidavit or other paper to be filed or oath taken before said Commission, shall be deemed guilty of perjury, and on conviction thereof shall be punished as for such offense.

ACT OF JULY 1, 1898 (30 STAT., 591).

That said Commission shall continue to exercise all authority heretofore conferred on it by law.

Appeals shall be allowed from the United States courts in the Indian Territory direct to the Supreme Court of the United States to either party, to all citizenship cases, and in all cases between either of the Five Civilized Tribes and the United States involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands in the Indian Territory, under the rules and regulations governing appeals to said court in other cases: *Provided,* That appeals in cases decided prior to this act must be perfected in one hundred and twenty days from its passage; and in cases decided subsequent thereto, within sixty days from final judgment; but in no such case shall the work of the Commission to the Five Civilized Tribes be enjoined or suspended by any proceeding in or order of any court, or of any judge, until after final judgment in the Supreme Court of the United States. In case of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible.

ACT OF MARCH 31, 1900 (31 STAT., 221).

That said Commission shall continue to exercise all authority heretofore conferred on it by law. But it shall not receive, consider, or make any record of any application of any person for enrollment as a member of any tribe in Indian Territory who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such, *and its refusal of such applications shall be final when approved by the Secretary of the Interior.*

ACT OF MARCH 3, 1901 (31 STAT., 1073).

The rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, *shall be final,* and the persons whose names are found thereon *shall alone constitute* the several tribes which they represent; and the Secretary of the Interior is authorized and directed to fix a time by agreement with said tribes or either of them, for closing said rolls, but upon failure or refusal of said tribes, or any of them, to agree thereto, then the Secretary of the Interior shall fix a time for closing said roll, after which no name shall be added thereto.

ACT OF JULY 1, 1902 (32 STAT., 716).

SEC. 31. Allotment certificates issued by the Dawes Commission shall be conclusive evidence of the right of an allottee to the tract of land described therein, and the United States Indian agent for the Union Agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to him, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

SEC. 22. *Exclusive jurisdiction is hereby conferred upon*

the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior, to determine all matters relative to the appraisement and the allotment of lands.

* * * * * * *

SEC. 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

SEC. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, and no child born thereafter to a citizen, and no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.

SEC. 27. Such rolls shall in all other respects be made in strict compliance with the provisions of section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), and the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one).

SEC. 28. No person whose name appears upon the roll made by the Dawes Commission as a citizen or freedman of any other tribe shall be enrolled as a citizen of the Cherokee Nation.

SEC. 29. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said Commission shall, from time to time, and as soon as practicable, forward to the Secretary of the Interior lists upon which shall be placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the

Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe upon which allotment of land and distribution of other tribal property shall be made. When there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete. The roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes.

SEC. 30. During the months of September and October, in the year nineteen hundred and two, the Commission to the Five Civilized Tribes may receive applications for enrollment of such infant children as may have been born to recognized and enrolled citizens of the Cherokee Nation on or before the first day of September, nineteen hundred and two, but the application of no person whomsoever for enrollment shall be received after the thirty-first day of October, nineteen hundred and two.

SEC. 31. *No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe,* and those whose names appear thereon shall participate in the manner set forth in this act: *Provided,* That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person, whose name is not on said roll and who died prior to the first day of September, nineteen hundred and two. The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before said date, and any person or persons who may conceal the death of any one on said roll, as aforesaid, for the purpose of profiting by said concealment, and who shall knowingly receive any portion of land or other tribal prop-

erty or of the proceeds so arising from any allotment prohibited by this section, shall be deemed guilty of a felony, and shall be proceeded against as may be provided in other cases of felony, and the penalty for this offense shall be confinement at hard labor for a period of not less than one year nor more than five years, and in addition thereto a forfeiture to the Cherokee Nation of the lands, other tribal property, and proceeds so obtained.

ACT OF APRIL 26, 1906 (34 STAT., 137).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That after the approval of this act no person shall be enrolled as a citizen or freedman of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes of Indians in the Indian Territory, except as herein otherwise provided, unless application for enrollment was made prior to December first, nineteen hundred and five, and the records in charge of the Commissioner to the Five Civilized Tribes shall be conclusive evidence as to the fact of such application; and no motion to reopen or reconsider any citizenship case, in any of said tribes, shall be entertained unless filed with the Commissioner to the Five Civilized Tribes within sixty days after the date of the order or decision sought to be reconsidered, except as to decisions made prior to the passage of this act, in which cases such motion shall be made within sixty days after the passage of this act: *Provided,* That the Secretary of the Interior may enroll persons whose names appear upon any of the tribal rolls and for whom the records in charge of the Commissioner to the Five Civilized Tribes show application was made prior to December first, nineteen hundred and five, and which was not allowed solely because not made within the time prescribed by law.

SEC. 2. That for ninety days after approval hereof applications shall be received for enrollment of children who were minors *living March fourth, nineteen hundred and six,*

whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek tribes, or have applications for enrollment pending at the approval hereof, and for the purpose of enrollment under this section illegitimate children shall take the status of the mother, and allotment may be made to children so enrolled. If any citizen of the Cherokee tribe shall fail to receive the full quantity of land to which he is entitled as an allotment, he shall be paid out of any of the funds of such tribes a sum equal to twice the appraised value of the amount of land thus deficient. The provisions of section nine of the Creek agreement ratified by act approved March first, nineteen hundred and one, authorizing the use of funds of the Creek tribe for equalizing allotments, are hereby restored and re-enacted, and after the expiration of nine months from the date of the original selection of an allotment of land in the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, and after the expiration of six months from the passage of this act as to allotments heretofore made, no contest shall be instituted against such allotment: *Provided. That the rolls of the tribes affected by this act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date: Provided further,* That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application had been fixed by agreement between said tribe and the United States: *Provided,* That nothing herein shall apply to the intermarried whites in the Cherokee Nation, whose cases are now pending in the Supreme Court of the United States.

SEC. 3. *That the approved roll of Creek freedmen shall include only those persons whose names appear on the roll prepared by J. W. Dunn,* under authority of the United States prior to March fourteenth, eighteen hundred and sixty-seven, and their descendants born since said roll was

made, and those lawfully admitted to citizenship in the Creek Nation subsequent to the date of the preparation of said roll, and their descendants born since such admission, except such, if any, as have heretofore been enrolled and their enrollment approved by the Secretary of the Interior.

The roll of Cherokee freedmen shall include only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants, who were actual personal bona fide residents of the Cherokee Nation August eleventh, eighteen hundred and sixty-six, or who actually returned and established such residence in the Cherokee Nation on or before February eleventh, eighteen hundred and sixty-seven; but this provision shall not prevent the enrollment of any person who has heretofore made application to the Commission to the Five Civilized Tribes or its successor and has been adjudged entitled to enrollment by the Secretary of the Interior.

Lands allotted to freedmen of the Choctaw and Chickasaw tribes shall be considered "homestead," and shall be subject to all the provisions of this or any other act of Congress applicable to homesteads of citizens of the Choctaw and Chickasaw tribes.

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE CHEROKEE NATION AND THE UNITED States, appellants,
v.
MOSES WHITMIRE, TRUSTEE FOR THE Freedmen of the Cherokee Nation.
No. 735.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On September 26, 1891, suit was brought by Moses Whitmire, as trustee for the Cherokee freedmen, under a special act of Congress approved October 1, 1890 (26 Stat., 636), giving the Court of Claims jurisdiction to hear and determine, among other things, the right of the Cherokee freedmen under article 9 of the treaty, between the United States and the Cherokee Nation, of July 19, 1866 (14 Stat., 799), to participate in the distribution of

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the funds derived from the sale of the Cherokee tribal lands west of the ninety-sixth degree of west longitude. (Rec., pp. 14–16.)

On March 4, 1895, a judgment was rendered by the Court of Claims in favor of the right of the freedmen to participate in such funds, but the entry of judgment was suspended until the court could be furnished with accurate information as to the number of freedmen entitled to participate in the distribution of the judgment. (30 C. Cls., 138–159.)

On March 18, 1895, judgment was entered by the court in favor of the freedmen for $903,365; and on May 8, 1895, a decree was entered providing for the distribution of the judgment. (30 C. Cls. 180–196.) From this judgment both the claimants and defendants filed applications for appeals to this court, and a motion for a new trial was also filed by the defendants. On January 30, 1896, the claimants and defendants filed motions to withdraw their applications for appeal; and on February 3, 1896, the decree of May 8, 1895, was vacated and a new and final decree was entered by the Court of Claims, all the parties to the suit consenting thereto. (Rec., pp. 36–42.)

By virtue of the authority contained in the decree of February 3, 1896, the Secretary of the Interior appointed three commissioners to make a roll of Cherokee freedmen entitled to participate in the distribution of the judgment; and on February

20, 1896, he issued instructions to the said commissioners to "proceed to the Cherokee country and hear the testimony both for and against the identity of all the freedmen, free colored persons, and their descendants, claiming to be entitled to share in the distribution of said $903,365 that may be offered by the three respective parties to said suit." Robert H. Kern, the attorney for the freedmen, was one of the commissioners. (Rec., pp. 61–65.)

In pursuance of the instructions of the Secretary a roll was made, and in accordance with the directions of the decree the judgment was distributed *per capita* to the freedmen found thereon. This roll was afterwards known as the Kern-Clifton roll. (Rec., pp. 108–113.)

When the act of June 28, 1898 (30 Stat., 495), known as the Curtis Act, which provided for the making of a roll of Cherokee citizens for the allotment of their tribal lands east of the ninety-sixth degree of west longitude, came up for consideration in Congress, the Cherokee tribal roll of 1880 and the Creek tribal roll made by J. W. Dunn were confirmed (sec. 21), but an amendment to confirm the Kern-Clifton roll was defeated. (Rec., pp. 67–70.)

On July 1, 1902, another act was approved (32 Stat., 716), known as the Cherokee allotment act, which reenacted the provisions for making the rolls contained in section 21 of the act of June 28, 1898, *supra*, and made provision for the allotment of the

Cherokee tribal lands east of the ninety-sixth degree of west longitude. All the lands west had been disposed of a number of years before, the last on March 2, 1893. (27 Stat., 640, 641, 642.)

In pursuance of instructions issued by the Secretary of the Interior, dated May 11, 1900 (Rec., pp. 70, 72, 73), a roll of Cherokee citizens entitled to allotment was commenced, and was finally completed after the passage of the acts of July 1, 1902, *supra*, and April 26, 1906 (34 Stat., 137), to-wit, March 4, 1907, at which time practically all of the Cherokee tribal lands had been allotted to citizens of the Cherokee Nation (*Muskrat et al.* v. *United States,* 44 C. Cls., 137), including 4,924 freedmen. (Rec., p. 100.) The instructions issued by the Secretary of the Interior to the Commission to the Five Civilized Tribes directed them to take the decree of the Court of Claims alone as a guide for making the roll, and called attention to the fact that the accuracy of the Kern-Clifton roll had been questioned and that Congress had in passing the act of June 28, 1898, *supra,* disregarded it. (Rec., pp. 70, 72.)

On September 30, 1907, a motion was filed by the original attorney of the freedmen in this case and two new attorneys for the substitution of a new trustee and leave to file a supplemental petition, over six months after the closing of the Cherokee tribal rolls, which was allowed by the Court of Claims on April 20, 1908, over a year after the final

closing of the rolls on March 4, 1907, as provided by the act of April 26, 1906, *supra*. The supplemental petition in substance prayed the Court of Claims to order the Secretary of the Interior to reopen the Cherokee tribal rolls and enroll for allotment 1,606 alleged Cherokee freedmen whose names are found on the Kern-Clifton roll, but who had been refused enrollment by the Commission to the Five Civilized Tribes. (Rec., pp. 47–52.)

On February 20, 1911, a decree was filed by the Court of Claims, enjoining the Secretary of the Interior from discriminating between Cherokee freedmen and other citizens of the Cherokee Nation in the distribution of tribal funds and allotment of tribal lands, and directed him to place their names upon the Cherokee rolls and to permit the persons named in said decree to participate in the allotment of the common lands and the distribution of the common funds of the Cherokee Nation. (Rec., pp. 235–246.)

From this decree the defendants on March 30, 1911, filed an application for appeal to this court, which was withdrawn by motion of defendants filed and allowed May 15, 1911, and on the same day the defendants filed a motion for a new trial. On June 5, 1911, the motion for a new trial was overruled by the Court of Claims. On June 17, 1911, an application for appeal from the decree of February 20, 1911, was filed by the defendants and allowed on the same day. (Rec., pp. 247, 248.)

On December 11, 1911, the appellee filed a motion in this court to dismiss the appeal upon the grounds that the decree of February 20, 1911, raised no new questions and was simply made in execution of the decree of February 3, 1896, and that the appeal had not been prosecuted in time.

ASSIGNMENT OF ERRORS.

The Court of Claims erred:

First. In holding that it had jurisdiction to issue the writ of injunction to the Secretary of the Interior ordering him to reopen the Cherokee rolls, closed by act of Congress on March 4, 1907, and to enroll certain alleged Cherokee freedmen whose names appear on the Kern-Clifton roll, but who were refused enrollment by the Commission to the Five Civilized Tribes, and to allot them tribal lands of the Cherokee Nation as though they were citizens by blood of said nation.

Second. In not holding that the jurisdictional act limited the suit of the freedmen instituted thereunder to a determination of their right to recover their proportionate shares of the proceeds of the sale of Cherokee lands west of the ninety-sixth degree of west longitude, paid to the Cherokees by blood to the exclusion of the Delawares, Shawnees, and freedmen.

Third. In not holding that the directions contained in section 1 of the jurisdictional act of Octo-

ber 1, 1890, *supra*, "to hear and determine what are the just rights in law or in equity * * * of the Cherokee freedmen who are settled and located in the Cherokee Nation under the provisions and stipulations of article 9 of the aforesaid treaty of 1866, in respect to the subject matter herein provided for," when considered independently of sections 2 and 3 of said act, presented a moot question for consideration.

Fourth. In holding that the Kern-Clifton roll was confirmed by section 21 of the act of June 28, 1898, *supra*, which directed that the Commission to the Five Civilized Tribes should "make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims, rendered the third day of February, eighteen hundred and ninety-six."

Fifth. In not holding that Congress conferred upon the Secretary of the Interior by the acts of June 28, 1898 (30 Stat., 495), and July 1, 1902 (32 Stat., 716), exclusive jurisdiction to make the rolls of Cherokee citizens, including the freedmen, entitled to participate in the distribution of the tribal funds and the allotment of tribal lands.

Sixth. In failing to find that the claimant was guilty of laches in not having taken appropriate action in time.

Seventh. In not dismissing the claimant's supplemental petition.

ARGUMENT.

Objections to appellee's motion to dismiss appeal.

The appellee has requested the court to dismiss the appellant's appeal from the last decree of the Court of Claims for the following reasons:

> 1. Because on the 3d day of February, 1896, the Court of Claims passed its decree by consent of all the parties to this cause, by which all the rights of all parties in and to the subject matter in controversy were fully and finally determined, and the said decree was a final decree, from which no appeal was prosecuted to this court.
>
> 2. Because the decree passed in this court on the 20th day of February, 1911, from which this appeal is prayed, was merely in the nature of an execution of said decree of February 3, 1896, and defined no new rights in the parties to this proceeding, but sought merely to enforce rights already established and consented to.
>
> 3. Because although the decree of February 20, 1911, was regularly entered on that day the appeal in this cause to this court was not allowed and prosecuted until the 17th day of June, 1911, which is more than 90 days after the entry of said decree on said 20th day of February, 1911.

The appellants object to the allowance of the motion because the decree of February 3, 1896, was entered for the sole purpose of distributing *per capita* to the Cherokee freedmen the proceeds of

a judgment rendered by the Court of Claims in their favor for their proportionate shares of the Cherokee lands west of the ninety-sixth degree of west longitude, which had been sold prior to the passage of the act conferring jurisdiction upon the Court of Claims, and distributed to the Cherokees by blood to the exclusion of the Shawnees, Delawares, and freedmen. After the distribution, about 14 years ago, the said decree having performed its office, its powers became exhausted, and for any future effect became a nullity. (30 C. Cls., 180, 188; jurisdictional act and report thereon, Rec., pp. 14–16, 53–57, 58.)

Second. The decree of February 20, 1911, for the reasons already stated, could not have been made by the Court of Claims in execution of the decree of February 3, 1896. So far from being in execution of that decree, it could not have been legally made under the jurisdictional act of October 1, 1890 (26 Stat., 636), which provided for suits to determine whether the Shawnees, Delawares, and freedmen were entitled to participate in the distribution of the proceeds of Cherokee tribal lands west of the ninety-sixth degree of west longitude, or west of the Arkansas River, which had been disposed of prior to the passage of the jurisdictional act. The decree of February 20, 1911, assumes a jurisdiction which it does not possess—of issuing a writ of injunction directed to the Secretary of the Interior ordering him to reopen the Cherokee rolls,

completed on March 4, 1907, by act of Congress, and to allot to certain alleged Cherokee freedmen tribal lands of the Cherokee Nation *east* of the ninety-sixth degree of west longitude. None of the Cherokee funds which was the subject of controversy under the jurisdictional act of October 1, 1890, were derived from the sale of the lands east of the ninety-sixth degree of west longitude. In fact, none of those lands have ever been sold, but have always been preserved as the home of the Cherokee Nation, and did not become even subject to allotment until July 1, 1902. (32 Stat., 716.)

The allegation, however, in the appellee's motion to dismiss compels us to discuss the case on its merits, in order to satisfy the court that the decree of February 20, 1911, was not in execution of the defunct decree of February 3, 1896.

Third. The third and final ground upon which the appellee bases his motion to dismiss the appeal is that the appeal from the decree of February 20, 1911, was not prosecuted and allowed until June 17, 1911, more than 90 days after the entry of said decree.

On March 30, 1911, appellants, defendants below, filed an application for appeal to this court. On May 15, 1911, the defendants filed a motion to withdraw the application for appeal, which was allowed on May 15, 1911. Thereupon, on the same day (May 15, 1911), the defendants filed a motion for a new trial, which was overruled by the Court

of Claims on June 5, 1911. (Rec., p. 247.) On June 17, 1911, an application for appeal was filed and allowed by the Court of Claims. (Rec., p. 248.)

The motions for rehearings of May 17, 1909, and May 31, 1910, referred to in the appellee's brief on his motion to dismiss, page 9, related entirely to the substitution of a trustee for the Cherokee freedmen in place of the old trustee who had died some years before, and the allowance of a motion to file a supplemental petition in the case. The orders of the court allowing the substitution and the filing of the petition did not, in our opinion, constitute a judgment of the Court of Claims from which an appeal could have been taken.

The operation of the decree of February 20, 1911, was suspended by the motion for a new trial filed May 15, 1911, and the decree did not become effective until the motion was overruled by the Court of Claims on June 5, 1911, when the ninety days' limitation began to run. A judgment or decree does not become final, so far as the ninety days' period is concerned, until all motions for new trials have been overruled by the court. To hold otherwise would be to deprive litigants either of their right to make motions for new trials or to prosecute appeals, as both could not under such a ruling be prosecuted at the same time.

This, we think, was settled by the case of *Kingman* v. *Western Manufacturing Company* (170

U. S., 675), where the court said at pages 680 and 681:

> The question before us is merely whether a judgment is final so that the jurisdiction of the appellate court may be invoked while it is still under the control of the trial court through the pendency of a motion for a new trial. *We do not think it is, and are of opinion that the limitation did not commence to run in this case until the motion for new trial was overruled.*

This court in the case of *Aspen Mining & Smelting Company* v. *Billings* (150 U. S., 31) said at page 36:

> The rule is that if a motion or a petition for rehearing *is made or presented in season and entertained by the court,* the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal.

In that case, although the judgment of the court was entered on October 20, 1890, the motion for a rehearing was not disposed of until May 5, 1891; whereas in the case at bar the decree was entered February 20, 1911, and the motion for a new trial was disposed of on June 5, 1911, and was seriously entertained by the Court of Claims as shown by the order overruling the motion. (Rec., p. 247.)

The Court of Claims has no jurisdiction to issue the writ of injunction to the Secretary of the Interior.

The Court of Claims under its general jurisdiction has no authority to issue the writ of injunction or take any affirmative action whatever other than the rendition of a money judgment where it has jurisdiction (*United States* v. *Milliken,* 202 U. S., 168); and incidently under its equity jurisdiction to reform a contract so as to express the true intent of the parties (*Hearne* v. *Marine Ins. Co.,* 20 Wall., 490, 491; *Walden* v. *Skinner,* 101 U. S., 583, 584; *South Boston Iron Works* v. *United States,* 34 C. Cls., 174).

In the case of *United States* v. *Jones* (131 U. S., 1–20), brought to compel the Government to issue and deliver patents to certain timber lands, this court after discussing the organic acts conferring jurisdiction upon the Court of Claims held that the jurisdiction of the Court of Claims was limited to the rendition of "money decrees" and "money judgments."

The jurisdictional act of October 1, 1890, *supra,* under which this suit was originally brought, so far from conferring jurisdiction upon the Court of Claims to order the Secretary of the Interior to reopen the Cherokee rolls closed by positive act of Congress on March 4, 1907 (act of Apr. 26, 1906, 34 Stat., 137), limited it to the collection of a money judgment by execution, mandamus, or any other analogous remedy. (Sec. 3.)

Injunction, an equitable relief, can not be substituted for mandamus, which is an action at law. (*Commonwealth of Kentucky* v. *Dennison*, etc., 24 How., 97; *Walkley* v. *City of Muscatine*, 6 Wall., 483.)

In addition to what we said as to the power of the Court of Claims to grant the writ of injunction, we call the attention of the court to the fact that the appellee in his petition has not asked for the allotment of Cherokee tribal lands to freedmen named in the decree of February 20, 1911, and that the action of the court below was entirely gratuitous.

The decree of February 20, 1911, has also assumed the jurisdiction of Congress, in giving to freedmen children born between March 4, 1906, and March 4, 1907, the right to enrollment, in opposition to the provision of the act of April 26, 1906, *supra*, fixing March 4, 1906, as the limit, after which children born of enrolled Cherokee citizens were not entitled to enrollment.

In the case of the Sac and Fox Indians (220 U. S., 65) this court said that a suit instituted under a similar act for a sum of money claimed to have been paid to the wrong parties was really an action at law.

The jurisdictional act of October 1, 1890, only provided for a money judgment.

The alleged supplemental decree rendered on February 20, 1911, was made upon the strength of this language, used in the first section of the

act conferring jurisdiction upon the Court of Claims:

> To hear and determine what are the just rights in law or in equity * * * of the Cherokee freedmen who are settled and located in the Cherokee Nation under the provisions and stipulations of article nine of the aforesaid treaty of eighteen hundred and sixty-six in respect to the subject matter herein provided for.

The *subject matter* referred to was evidently the suits provided for in sections 2 and 3 of the act, to determine the right of the Delawares, Shawnees, and freedmen to participate in the distribution of the proceeds of the sale of lands *west* of the ninety-sixth degree of west longitude, which had been paid to the Cherokees by blood to the exclusion of the Delawares, Shawnees, and freedmen; otherwise the first section of the jurisdictional act considered by itself would present a moot question, as it merely asks for the opinion of the Court of Claims. (*Muskrat* v. *United States*, 219 U. S., 346.)

The purposes for which the jurisdictional act was passed are clearly set out in a report of the Committee on Indian Affairs of the Senate, and were also explained in detail on the floor of the House and Senate by the respective chairmen of the Committees on Indian Affairs. The controversy, as stated in the committee report, arose out of the sale, leasing, and allotment of tribal lands

of the Cherokee Nation west of the ninety-sixth degree of west longitude. The proceeds of the sale of such lands had been paid to the Cherokees by blood to the exclusion of the Delawares, Shawnees, and Freedmen, adopted citizens of the Cherokee Nation, and the jurisdictional act was passed to determine their right to participate in the distribution of such funds, and gave the Court of Claims jurisdiction to render judgment and to collect the same by mandamus or any other analogous remedy. (Rec., pp. 14, 53–57.)

In order to understand the purpose of the jurisdictional act and the explanation of its objects given by the chairmen of the Committees on Indian Affairs of the House and Senate, it is necessary to examine the treaties and acts of Congress responsible for the act under consideration. The court, under the authority of the case of *Binns* v. *United States* (194 U. S., 486–496), may consider the explanations of Senator Dawes and Representative Peel as to the objects intended to be accomplished.

By the treaty of July 19, 1866 (14 Stat., 799), between the Cherokee Nation and the United States, ratified July 27, 1866, the Cherokee confiscation laws were repealed and the former owners of the confiscated lands were restored to their homes. (Art. 3.) The Cherokee Nation on its part agreed—

> that all freedmen who have been liberated by voluntary act of their former owners or

by law, as well as all free colored persons who were in the country at the commencement of the rebellion and are now residents therein or who may return within six months, and their descendants, shall have all the rights of native Cherokees. (Art. 9.)

Section 5 of the amendments to article 3 of the Cherokee constitution, adopted in 1866, provides that—

> All native-born Cherokees, all Indians and whites legally members of the nation by adoption, and all freedmen who have been liberated by voluntary act of their former owners or by law, as well as free colored persons who were in the country at the commencement of the rebellion and are now residents therein, or who may return within six months from the 19th day of July, 1866, and their descendants who reside within the limits of the Cherokee Nation, shall be taken and admitted to be citizens of the Cherokee Nation. (40 C. Cls., 141.)

Section 2 of article 1 of the constitution of the Cherokee Nation provides that—

> Whenever any citizen shall remove with his effects out of the limit of this nation and become a citizen of any other government, all his rights and privileges as a citizen of this nation shall cease: *Provided, nevertheless,* That the national council shall have power to readmit by law to all the rights of citizenship any such person or persons who

may at any time desire to return to the nation on memorializing the national council for such readmission.

By article 15 of the treaty of 1866 the unoccupied lands east of the ninety-sixth degree of west longitude were reserved for the occupation of the Cherokee Indians, with the provision that upon the consent of the Cherokee Nation and the payment of an agreed price other civilized Indians might be settled upon said land.

By article 16 the Cherokee Nation agreed to the sale of the lands west of the ninety-sixth degree of west longitude, long before the jurisdictional act in this case was thought of. It provided that the Government might allot friendly Indians 160 acres of land each, the compensation to be paid to the Cherokee Nation.

Article 19 provided that heads of Cherokee families, residing on the lands west of the ninety-sixth degree of west longitude, desiring to remove to the reserved lands east of the ninety-sixth degree of west longitude, should be paid for their lands, but such as elected to remain should receive in fee simple 300 acres of land, including improvements, and their families should cease to be members of the Cherokee Nation.

By the acts of June 16, 1880 (21 Stat., 248), and May 19, 1883 (22 Stat., 624), Congress appropriated $300,000 each, to be paid into the treasury of the Cherokee Nation as compensation for the lands

west of the Arkansas River (west of the ninety-sixth degree of west longitude), to "be expended as the acts of the Cherokee legislature direct."

In 1880 a roll was made of the Cherokee Nation for the purpose of showing the number of Cherokees by blood and the number of Delawares, Shawnees, and freedmen entitled to citizenship in the Cherokee Nation under the treaty of July 19, 1866. The names of 1,874 freedmen appear upon this roll. (Rec., p. 63.)

In accordance with this roll the $600,000 paid for the lands west of the ninety-sixth degree of west longitude were distributed among the Cherokees by blood, to the exclusion of Delawares, Shawnees, and freedmen.

By the act of October 19, 1888 (25 Stat., 609), Congress appropriated $75,000 to be distributed *per capita* among the freedmen and their descendants mentioned in the ninth article of the treaty of July 19, 1866, and among the Delawares and Shawnees, in such amount or amounts as would equal the *per capita* payment made to the Cherokees by blood, in accordance with the act of the Cherokee legislature, out of the sum of $300,000 appropriated by the act of March 3, 1883 (22 Stat., 624), and made the said $75,000 a lien upon the lands of the Cherokee Nation west of the Arkansas River, which is the same as the west of the ninety-sixth degree of west longitude.

The remaining lands of the Cherokee Nation, known as the Cherokee outlet, were sold to the

United States on March 2, 1893. (27 Stat., 640, 641, 642.)

The Court of Claims, in its opinion, when it rendered the judgment of $903,365 in favor of Moses Whitmire, trustee for the Cherokee freedmen, said (30 C. Cls., 188):

> It is simply a suit in equity, brought by the equitable owners of a specific fund to recover their proportionate share in the same. The jurisdictional act recognizes this principle, for it authorizes suit to be brought for the proportionate shares of the parties in funds derived from the sales or leasing of lands of the Cherokee Nation. The court can not go beyond this if it would. * * *

This construction of the jurisdictional act was in exact accord with the object for which it was passed, as set out in report of the Senate Committee on Indian Affairs. (Rec., p. 56.)

The decree of February 3, 1896, which superseded the decree of March 18, 1895, was made by the Court of Claims for the purpose of having a roll prepared of "freedmen entitled to participate in the distribution of the fund now awarded to the complainant," and the distribution of the judgment. (Rec., pp. 188, 189.)

We believe that the jurisdictional act provided only for the rendition of a money judgment, and the judgment having been distributed, the decree of February 3, 1896, having accomplished its purpose, became exhausted.

The Court of Claims in its opinion in support of the decree of February 20, 1911, said:

> The general rule is that the decree of a court of equity is not final so long as there remains anything to be done touching the parties or the subject matter of the controversy. The court took that view when it declared that "the court reserves the right to make all such further orders in aid hereof as to it may seem meet." (Rec., p. 225.)

We think the court has given to the language quoted from the decree a meaning which was not intended by its framers; for if this language is considered in connection with that which immediately precedes it (Rec., p. 41), it becomes clear that the "further orders" related only to such as might be made to compel the payment of the money judgment for the distribution of which the decree was made.

Congress directed the Dawes Commission to make a roll of Cherokee freedmen in strict compliance with the decree of February 3, 1896, because the Kern-Clifton roll had not been so made.

On March 3, 1893 (27 Stat., 645), Congress created a Commission of the Five Civilized Tribes, known as the Dawes Commission, for the purpose of procuring the extinguishment of the national or tribal title to the lands held by the tribes living in Indian Territory and their cession to the United States for allotment in severalty among the members thereof.

Congress afterwards, by the act of June 10, 1896 (29 Stat., 321), ignoring the Kern-Clifton roll, directed the Dawes Commission to make a roll of the Five Civilized Tribes and at the same time ratified the tribal rolls as they then existed, so that the duty of the commission was limited to passing upon the qualifications of applicants for enrollment. The act provided that:

> The said commission shall also make a roll of freedmen entitled to citizenship in said tribes, and shall include their names in the lists of members to be filed with the Commissioner of Indian Affairs. (*Supra*, p. 340.)

By act of June 7, 1897 (30 Stat., 83), Congress increased the powers of the Dawes Commission and made further provision for the authenticated tribal rolls, but made no reference to the Kern-Clifton rolls.

By section 21 of the act of June 28, 1898, *supra*, Congress directed the commission to make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims of February 3, 1896, because the Kern-Clifton roll contained the names of many freedmen who were either not entitled in the first place or who had forfeited their rights of citizenship in the Cherokee Nation under article 9 of the treaty of July 19, 1866, *supra*, and the Cherokee constitution.

The freedmen who were enrolled by the Kern-Clifton Commission, and who were afterwards re-

fused enrollment by the Dawes Commission, and who are named in the decree of the Court of Claims of February 20, 1911, from which this appeal has been taken, are the same freedmen whom their attorney on April 14, 1896, requested the Court of Claims to order to be enrolled by the Secretary of the Interior, and which that court refused to do because it said the Secretary had exclusive authority to make the roll. (Rec., pp. 60, 65–67.) They were not enrolled by the Dawes Commission for the most part because they had forfeited their rights to citizenship in the Cherokee Nation. (Rec., pp. 108–192.)

The rolls were made by the Dawes Commission in accordance with the instructions of the Secretary of the Interior of May 11, 1900, prepared by the Assistant Attorney General for the Interior Department, which directed the commission to ignore the Kern-Clifton roll and be guided solely by the decree of February 3, 1896. The instructions called attention to the fact that Congress had refused to confirm that roll when it directed the commission to make a roll of freedmen in strict compliance with the decree of the Court of Claims. (Rec., pp. 70–73.)

When the bill which afterwards became the act of June 28, 1898, *supra,* was under consideration in the Senate it was proposed to amend the language of the bill, "it shall make a roll of Cherokee freedmen in strict compliance with the decree of February 3, 1896," by adding a provision thereto con-

firming the Kern-Clifton roll. The Congressional Record shows that the amendment was defeated and the bill passed as it came from the House. (Rec., pp. 67–70.)

Congress also refused to accept an amendment to section 3 of the bill which afterwards became the act of April 26, 1896 (34 Stat., 137), directing the enrollment of Cherokee freedmen who had forfeited their rights of citizenship, and whom the Court of Claims had refused to order the Secretary to place upon the Kern-Clifton roll, but whom he did nevertheless place upon said roll, but who were afterwards refused enrollment by the Dawes Commission. (Cong. Rec., vol. 40, pt. 2, pp. 1240, 1248, 1249.)

The Cherokee freedmen were given every opportunity by the commission to present their claims to enrollment and to be heard upon their claims of citizenship in the Cherokee Nation, and 4,924 were placed upon the Cherokee rolls. The Department of the Interior has furnished a number of test and typical cases which have been set out in the record. (Rec., pp. 100, 108–192.)

Congress gave the Secretary of the Interior exclusive jurisdiction to make the Cherokee rolls.

Congress by an item of the Indian appropriation act, approved May 31, 1900 (31 Stat., 221), provided:

> That said commission shall continue to exercise all authority heretofore conferred

> on it by law. But it shall not receive, consider, or make any record of any application of any person for enrollment as a member of any tribe in Indian Territory who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such, *and its refusal of such applications shall be final when approved by the Secretary of the Interior.*

Section 21 of the act of June 28, 1898, *supra,* provided that the Cherokee rolls, "when approved by the Secretary of the Interior, shall be final."

Section 21 of the act of July 1, 1902, provided that the Indian agent in placing Indians in possession of their allotments "shall not be controlled by the writ or process of any court."

Section 22 of the act of July 1, 1902, *supra,* conferred upon the Dawes Commission, under the direction of the Secretary of the Interior, exclusive jurisdiction "to determine all matters relative to the appraisement and allotments of lands."

Section 27 of the same act reenacted section 21 of the act of June 28, 1898.

Section 29 provided for the approval of lists of names forwarded by the Dawes Commission and that—

> The lists thus prepared, when approved by the Secretary of the Interior, shall constitute part and parcel of the final roll of citizens of the Cherokee tribe upon which allotment of land and distribution of other tribal property shall be made.

Section 2 of the act of April 26, 1906, fixed the date of the closing of the rolls as March 4, 1907, and provided that "the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date."

Soon after the entry of the decree of February 3, 1896, the counsel for both parties submitted to the Court of Claims a draft of instructions for the guidance of the Kern-Clifton commission, which that court declined to consider upon the ground that the instructions must be determined by the Secretary of the Interior. (Rec., p. 60.)

Again, when the attorney for the freedmen submitted instructions to the court to enroll the Cherokee freedmen who had forfeited their rights by removal, the court refused to order their enrollment, upon the ground that the matter was within the exclusive jurisdiction of the Secretary of the Interior (Rec., pp. 42–44), and referred to a previous construction of the decree of February 3, 1896, in which it held that "freedmen and the descendants of freedmen who did not return within six months are excluded from the benefits of the treaty and of the decree," meaning the treaty of July 19, 1866, *supra,* and the decree of February 3, 1893. (Rec., p. 42.)

Judge Raymond, in the United States District Court for the Eastern District of Indian Territory, in dissolving an injunction on August 25, 1903, to restrain the Dawes Commission from enrolling any

Cherokee freedmen whose names could not be found on the roll of 1880, or who could not trace their ancestors to some freedmen whose names could be found on that roll, said it was the duty of the Dawes Commission to construe the decree of February 3, 1896. He said, speaking of the Kern-Clifton roll—

> it would seem that this commission appointed by the Secretary of the Interior was for the purpose only of fixing a basis for the payment of the $903,365, and not as a basis for division of the public funds of the nation. (Ann. Rep. Int. Dept., 1904, pt. 2, pp. 138–161.)

The decision of Judge Raymond was based upon the decision of the case of *Kimberlin* v. *Commission to the Five Civilized Tribes* (104 Fed. R., 653), to the effect that the decisions of the Dawes Commission were judicial in their character and not subject to review by the courts.

The decision of this court in the cases of *Laurel Oil & Gas Co.* v. *Morrison et al.* (212 U. S., 291) and *Saas* v. *Thomas* (214 U. S., 489) made the decision of the Kimberlin case final, as that case, like the case at bar, arose prior to the admission of Oklahoma and Indian Territory into the Union as a State on November 16, 1907.

The Buffington and Kimberlin cases were reported by the Secretary of the Interior to Congress, and, therefore, subsequent legislation by Congress was enacted subject to the construction

placed upon the act of June 28, 1898, *supra,* by those two cases. This applies particularly to the act of July 1, 1902, which reenacted, in identical language, section 21 of the act of 1898, which provided for the making of the freedmen roll "in strict compliance with the decree of February 3, 1896." (*Romadka* v. *Sessions,* 145 U. S., 41; *Claflin* v. *Commonwealth Ins. Co.,* 110 U. S., 81; *The Abbotsford,* 98 U. S., 440.)

In the *Sac and Fox case* (220 U. S., 65, 79), this court in construing a similar act authorizing the Secretary of the Interior to make a roll of Sac and Fox Indians in Iowa said that the act "made the Secretary of the Interior the judge."

This court in the case of *Wallace* v. *Adams* (202 U. S., 415) held that Congress had full power over the question of citizenship in Indian tribes, and that it could adopt one method, and if that failed it could try another, and that investigations of citizenship were necessarily judicial in their character.

In the case of *West* v. *Hitchcock* (205 U. S., 80), the court held that—

> in the absence of any indication in the act to allow an appeal to the courts for applicants who are dissatisfied, mandamus will not issue to require the Secretary to approve the selection of one claiming to be an adopted member of the tribe, but whose application the Secretary has denied.

The court further said: "His jurisdiction does not depend upon his decision being right."

In the case of *Fleming et al.* v. *McCurtain et al.* (215 U. S., 56), this court refused to reopen the Choctaw tribal rolls.

The second case of *Pam-to-pee* v. *The United States* (187 U. S., 371), greatly relied upon by the appellees, is in reality strongly against their contention in this case. *In that case the rolls had been closed and the money judgment distributed, just as in this case.* It afterwards appeared that there was a class of Indians who had been left out, but who were entitled to participate in the judgment. The court held that "where the circumstances are as in the case at bar any further relief must be obtained from Congress and can not be given by the courts." The present Chief Justice and Mr. Justice McKenna dissented upon the ground that even in the distribution of a judgment of the Court of Claims the Secretary of the Interior had exclusive jurisdiction to determine the identity of the distributees.

This court in the case of *Phineas Pam-to-pee* v. *The United States* (148 U. S., 691, 705), known as the first Pam-to-pee case, speaking of the Pottawatomie Indians in Michigan and Indiana and referring to the case of the Old Settlers, where the Secretary of the Interior had also made the roll, said:

> As these petitioners no longer have any tribal organization, and as the statutes direct a division of the annuities and other sums payable, by the head, and as such has been the practice of the Government, perhaps the necessities of the situation demand

> that the identification of each claimant entitled to share in the distribution shall be left to the officers who are the agents of the Government in paying out the fund. (*United States* v. *Old Settlers, ante,* 427.)

In the case of *Garfield* v. *Goldsby* (211 U. S., 249), cited in the *Fleming case, supra,* the court held that "after the Secretary of the Interior has approved a list containing the name of a person found by the Dawes Commission to be entitled to enrollment for distribution he can not, without giving that person notice and opportunity to be heard, strike his name from the list. It would not be due process of law," because he had acquired vested rights.

The Court of Claims in its opinion was in error in stating that the Secretary of the Interior refused to enroll Goldsby. On the contrary, he had been enrolled, but the Secretary struck his name off prior to March 4, 1907, without having given him an opportunity to be heard. (Rec., p. 232.)

The *Lowe case* (34 D. C. App., p. 70), to which the court below referred in its opinion (Rec., p. 233), may be regarded as the converse of the Goldsby case. In that case the Secretary of the Interior, after approval by him, struck the name from the roll prior to March 4, 1907, but after notification and an opportunity to be heard had been given. There was no question of fraud in the case, as stated by the court in its opinion. The Court of Appeals of the District of Columbia sustained the exclusive

jurisdiction of the Secretary of the Interior under such circumstances, and the case is now in this court on appeal.

In the case of the *United States of America, Ex relatione Lucy Ann Turner et al.*, v. *Walter L. Fisher, Secretary of the Interior* (No. 60, Oct. term, 1911, decided Dec. 4, 1911), which came to this court on a writ of error from the Court of Appeals of the District of Columbia, the lower court refused to issue a writ of mandamus requiring the Secretary of the Interior to restore the names of certain Creek freedmen to the rolls of the Creek Nation from which they had been stricken. The court held upon the authority of *Garfield* v. *Goldsby, supra,* that the freedmen after the approval of the lists containing the names, acquired rights of which they "could not be deprived without that character of notice and opportunity to be heard essential to due process of law," and that notice given to their attorney a few hours before the hearing of the motion to strike their names from the roll "was not such notice as afforded due process."

The appellee was guilty of laches in not having taken appropriate action in time.

If the Cherokee freedmen named in the decree of February 20, 1911, had any legal right to enrollment which was not recognized by the Dawes Commission or the Secretary of the Interior, their appropriate remedy would have been by application for a writ of mandamus in some court of gen-

eral jurisdiction, presumably the Supreme Court of the District of Columbia, to compel the Secretary of the Interior to place their names upon the roll of freedmen of the Cherokee Nation. Such action should have been taken when the Secretary of the Interior, on May 11, 1900, issued instructions to the Commission to the Five Civilized Tribes to disregard the Kern-Clifton roll in making up the roll under the act of June 28, 1898, *supra* (Rec., pp. 70, 72), and to rely entirely upon the decree of February 3, 1896. (Rec., pp. 70, 72.) Failing in this, they should have made their applications for the writ of mandamus when the case of *Kimberlin* v. *Commission to the Five Civilized Tribes, supra,* was decided, on October 5, 1900, holding that the Dawes Commission had exclusive jurisdiction to make the rolls and that the courts had no jurisdiction to review their acts. Failing in this, they should have filed their applications for mandamus when Judge Raymond, in the Cherokee freedmen suit, on August 25, 1903, held that the Court of Claims had no jurisdiction to supervise the making of the rolls, and that the Commission to the Five Civilized Tribes, under the authority of the Kimberlin case, had exclusive jurisdiction to construe the decree of February 3, 1896. Failing in this, they should have made their application for mandamus upon the passage of the act of July 1, 1902, under which the allotments were made. Failing in this, they should have filed their application for mandamus when the numer-

ous test cases, to which we have already referred, were decided against them during the making up of the rolls. (Rec., pp. 108–192.) Failing in this, they should have filed application for mandamus when the act of April 26, 1906, *supra,* was passed setting March 4, 1907, as a date for the closing of the final rolls. Failing in this, they should have filed applications for mandamus before March 4, 1907.

The freedmen did none of these things, but stood supinely by while Congress passed act after act giving the Secretary of the Interior and the Dawes Commission exclusive authority to make the Cherokee tribal rolls, allot the Cherokee tribal lands, and distribute the Cherokee tribal funds. They saw the rolls made; they knew that 4,924 Cherokee freedmen had been enrolled by the Dawes Commission; they knew that many test cases had been decided and exhaustive opinions rendered by the commission and the Secretary of the Interior rejecting their applications for enrolment, yet did nothing until after the employees of the Government had worked for about seven years upon the rolls and expended vast sums of money in their preparation. On September 30, 1907, they filed their motion for a substitute trustee and leave to file their amended petition over six months after the closing of the rolls, which was allowed by the court on April 20, 1908, over a year after the closing of the rolls on March 4, 1907.

This case, we think, is very similar in its facts to *In the matter of the Eastern Cherokees, petitioners* (220 U. S., 83). In that case the Court of Claims, after the Eastern Cherokee case was finally decided (40 C. Cls., 252; 202 U. S., 128), filed on April 29, 1907, an order or supplemental decree directing *per capita* payments. The Secretary of the Interior had first been designated to make the roll, but at his request the court assumed the task. The roll was made by a commissioner of the court and approved March 7, 1910. On May 31, 1910, certain attorneys, claiming to represent the Eastern Cherokees, filed a motion in this court for leave to file a petition for mandamus to compel the Court of Claims to order the payment of the judgment *per stirpes*. The motion was allowed, on the day it was filed, but the petition was not filed until October 17, 1910. The court held upon the authority of the case of *In re Sanford Folk & Tool Co., petitioner* (160 U. S., 247–259), that the proper remedy would have been by mandamus if filed in time, or a second appeal from the order of April 29, 1907. (220 U. S., p. 89.)

If the decree from which this appeal has been taken is permitted to stand it means that about 1,606 persons shall be enrolled who have heretofore been excluded by the Dawes Commission from participating in the property of the Cherokee Nation. If these persons are to be enrolled upon the same terms as those members of the Cherokee Nation

already enrolled it will require more than $3,000,000 to satisfy the decree, which is considerably more than the entire tribal funds; the lands having already been allotted.

We ask that the judgment and decree of the Court of Claims be set aside, and the cause remanded, with such directions as this court may deem proper in the premises.

JOHN Q. THOMPSON,
Assistant Attorney General.

GEORGE M. ANDERSON,
Attorney.

APPENDIX.

AN ACT To refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That full jurisdiction is hereby conferred upon the Court of Claims, subject to an appeal to the Supreme Court of the United States as in other cases, to hear and determine what are the just rights in law or in equity of the Shawnee and Delaware Indians, who are settled and incorporated into the Cherokee Nation, Indian Territory, east of ninety-six degrees west longitude, under the provisions of article fifteen of the treaty of July nineteenth, eighteen hundred and sixty-six, made by and between the United States and the Cherokee Nation, and articles of agreement made by and between the Cherokee Nation and the Shawnee Indians June seventh, eighteen hundred and sixty-nine, approved by the President June ninth, eighteen hundred and sixty-nine, and articles of agreement made with the Delaware Indians April eighth, eighteen hundred and sixty-seven; and also of the Cherokee freedmen, who are settled and located in the Cherokee Nation under the provisions and stipulations of article nine of the aforesaid treaty of eighteen hundred and sixty-six in respect to the subject matter herein provided for.

SEC. 2. That the said Shawnees, Delawares, and freedmen shall have a right, either separately or jointly, to begin and prosecute a suit or suits against the Cherokee Nation and the United States Government to recover from the Cherokee Nation all moneys due either in law or equity and unpaid to the said Shawnees, Delawares, or freedmen, which the Cherokee Nation have before paid out, or may hereafter pay, per capita, in the Cherokee Nation, and which was, or may be, refused to or neglected to be paid to the said Shawnees, Delawares, or freedmen by the Cherokee Nation, out of any money or funds which have, or may be paid into the treasury of, or in any way have come, or may come, into the possession of the Cherokee Nation, Indian Territory, derived from the sale, leasing, or rent for grazing purposes on Cherokee lands west of ninety-six degrees west longitude, and which have been, or may be, appropriated and directed to be paid out per capita by the acts passed by the Cherokee council, and for all moneys, lands, and rights which shall appear to be due to the said Shawnees, Delawares, or freedmen under the provisions of the aforesaid articles of the treaty and articles of agreement.

SEC. 3. That the said suit or suits may be brought in the name of the principal chief or chiefs of the said Shawnee and Delaware Indians, and for the freedmen and in their behalf, and for their use in the name of some person as their trustee, to be selected by them with the approval of the Secretary of the Interior. And the exercise of such jurisdiction shall not be barred by any lapse of time heretofore, nor shall the rights of such Indians be

impaired by any acts passed and approved by the Cherokee national council. Suits may be instituted within twelve months after the passage of this act, and the law and practice and rules of procedure in such courts shall be the practice and law in these cases; and copies of petitions filed in the case at the commencement of the suit shall be served upon the Attorney General of the United States and on the principal chief in the Cherokee Nation by the marshal of the district court for the Indian Territory; and that the costs of the said suits shall be apportioned between the United States and the other parties to such suits as to said court law and equity shall require. The Attorney General shall designate and appoint from the Department of Justice a person who is competent to defend the said Cherokee Nation and the United States. And the said Shawnees, Delawares, and freedmen may be represented by attorneys and counsel. And the court is hereby authorized to decree the amount of compensation of such attorneys and counsel fees, not to exceed ten per centum of the amount recovered, and order the same to be paid to the attorneys and counsel of the said Shawnees, Delawares, and freedmen; and all judgments for any sum or sums of money which may be ordered or decreed by such court in favor of the Shawnees, Delawares, or freedmen, and against the Cherokee Nation, shall be enforced by the said court or courts against the said Cherokee Nation by execution, mandamus, or in any other way which the said court may see fit.

SEC. 4. That the said Shawnee Indians are hereby authorized and empowered to bring and

begin a suit in law or equity against the United States Government, in the Court of Claims, to recover and collect from the United States Government any amount of money that in law or equity is due from the United States to said tribes in reimbursement of their tribal fund for money wrongfully diverted therefrom. The right of appeal, jurisdiction of the court, process, procedure, and proceedings in the suit here provided for shall be as provided for in sections one, two, and three of this act.

Approved, October 1, 1890.

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FILED.
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JAMES H. McKENNEY,

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 735.

THE CHEROKEE NATION AND THE UNITED STATES, APPELLANTS,

vs.

MOSES WHITMIRE, TRUSTEE FOR THE FREEDMEN OF THE CHEROKEE NATION, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

SUPPLEMENTAL BRIEF FOR THE CHEROKEE NATION IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS THE APPEAL.

WILLIAM W. HASTINGS,
National Attorney for the Cherokee Nation.

IN THE

SUPREME COURT OF THE UNITED STATES.

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MOSES WHITMIRE, TRUSTEE FOR THE FREEDMEN OF THE CHEROKEE NATION, APPELLEE.

APPEAL FROM THE COURT OF CLAIMS.

Supplemental Brief for the Cherokee Nation in Opposition to Motion of Appellee to Dismiss the Appeal.

A motion has been filed by the appellee to dismiss the appeal in this case upon the following grounds:

IN THE

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APPEAL FROM THE COURT OF CLAIMS.

Supplemental Brief for the Cherokee Nation in Opposition to Motion of Appellee to Dismiss the Appeal.

A motion has been filed by the appellee to dismiss the appeal in this case upon the following grounds:

1. Because on the third day of February, 1896, the Court of Claims passed its decree by consent of all the parties to this cause, by which all the rights of all parties in and to the subject-matter in controversy were fully and finally determined, and the said decree was a final decree, from which no appeal was prosecuted to this court.

2. Because the decree passed in this court on the twentieth day of February, 1911, from which this appeal is prayed, was merely in the nature of an execution of said decree of February third, 1896, and defined no new rights in the parties to this proceeding, but sought merely to enforce rights already established and consented to.

3. Because although the decree of February twentieth, 1911, was regularly entered on that day the appeal in this cause to this court was not allowed and prosecuted until the seventeenth day of June, 1911, which is more than ninety days after the entry of said decree on said twentieth day of February, 1911.

First. In answer to the first grounds of the motion of appellee, it is insisted that the records and original briefs filed in this case show that appellants are not praying an appeal from the decree of the Court of Claims dated February 3, 1896, but from that dated February 20, 1911, and the order of the Court of Claims entered June 5, 1911, overruling their motion for a rehearing and a new trial. The original decree is not attacked, as our brief in this case will abundantly show.

Second. The second decree of February 20, 1911, is not in the nature of an execution of the decree of February 3, 1896, but construes numerous acts of Congress, including those of June 28, 1898 (30 Stat., 495), July 1, 1902 (32 Stat., 716), and April 26, 1906 (34 Stat., 137), and enjoins the Secretary of the Interior to enroll a large number of individual freedmen whom he had rejected as not being entitled to be enrolled under the law. Appellants are not attacking the decree of February 3, 1896. Appellants are attacking the decree of February 20, 1911, and are appealing from that decree and the order of June 5, 1911, overruling their motion for a rehearing, upon the following grounds:

(1) That the jurisdiction conferred upon the Court of Claims by the act of October 1, 1890 (26 Stat., 636), has been exhausted.

(2) That exclusive jurisdiction in citizenship matters was conferred upon the Secretary of the Interior by acts of Congress passed and approved subsequent to the entering of the decree of February 3, 1896.

(3) That petitioners, appellees here, have been guilty of such laches as would prevent them from being heard.

(4) That the Court of Claims erred in holding that Congress intended by enacting section 21 of

the act of June 28, 1898, *supra,* section 27 of the act of July 1, 1902, *supra,* and the act of April 26, 1906, to confirm the Kern-Clifton roll.

(5) That the Court of Claims erred in not holding that Congress had the power to change the method of making the Cherokee freedmen roll, and that Congress intended to make such change by the acts of June 28, 1898, July 1, 1902, and April 26, 1906, *supra.*

(6) That the Court of Claims erred in holding that it had jurisdiction to decree the reopening of the Cherokee freedmen rolls after March 4, 1907, the date fixed by section 2 of the act of April 26, 1906, for the final completion and approval of all Cherokee citizenship rolls.

(7) That the Court of Claims erred in holding that it had jurisdiction to grant injunctive relief in this case.

We have considered at length all of the above objections to the decree of the Court of Claims entered February 20, 1911, in our original brief filed in this case, and deem it unnecessary to further refer to them here.

We desire to direct the attention of the court to the similarity between this case and the Eastern Cherokee case, reported in 220 U. S., page 83. In the Eastern Cherokee case the final opinion was

rendered in this court on April 30, 1906 (202 U. S., 101), awarding a judgment to the Eastern Cherokees, as a band, in the sum of $1,111,284.70, with interest from June 12, 1838, to the date of payment, but the right of no individual was determined.

In the case at bar a final decree was entered on February 3, 1896, by the Court of Claims determining the rights of freedmen as a class, and awarding them a judgment of $903,365, but the right of no individual freedman was determined.

In April, 1907, the Court of Claims heard arguments as to the method of making the Eastern Cherokee roll, and decided on April 28, 1907, that a *per capita* distribution of the judgment awarded should be made. More than three years elapsed and a petition for a writ of mandamus was filed in this court on behalf of certain persons claiming as Eastern Cherokees to compel the Court of Claims to change the method of making the Eastern Cherokee roll, and this writ was denied upon the ground that petitioners were guilty of laches; but this court held (220 U. S., 83) that the second decree of the Court of Claims, entered April 28, 1907, could be reviewed by this court in the following language:

> *The action of the Court of Claims in rendering it could have been reviewed and corrected by appeal or mandamus.* (Italics ours.)

In the Eastern Cherokee case petitioners were not complaining of the original decision of this court, but of the subsequent decision of the Court of Claims entered April 28, 1907. In the case at bar appellants are not complaining of the original decree of February 3, 1896, but of the decree of February 20, 1911. We think that if an appeal could have been taken from the decision of the Court of Claims entered April 28, 1907, in the Eastern Cherokee case, certainly an appeal will lie from the decision of the Court of Claims in this case rendered February 20, 1911. (*Ex parte* Farmers Loan & Trust Co., 129 U. S., 206.)

The third ground of the motion to dismiss is because the decree was entered February 20, 1911, and the motion for an appeal was not allowed until the 17th day of June, 1911. The attention of the court is invited to the fact that the record shows that a motion for a rehearing and new trial was filed, and that the same was overruled by the Court of Claims on June 5, 1911, and the motion for an appeal was immediately filed and allowed by the Court of Claims on the 17th day of June, 1911, or twelve days after the denial of the motion for a rehearing and a new trial.

Kingman *vs.* Western Mfg. Co., 170 U. S., 675.

Aspen Mining & Smelting Co. *vs.* Billings, 150 U. S., 31.

WILLIAM W. HASTINGS,
National Attorney for the Cherokee Nation.

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NUMBER 735.

Supreme Court of the United States.

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FILED.
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JAMES H. McKENN

OCTOBER TERM, 1911.

MOSES WHITMIRE, TRUSTEE FOR THE FREEDMEN OF THE CHEROKEE NATION, APPELLEE.

VS.

THE CHEROKEE NATION AND THE UNITED STATES, APPELLANTS,

BRIEF IN SUPPORT OF THE CONTENTIONS OF THE APPELLANTS.

GEO. S. RAMSEY,
Amicus Curiae.

NUMBER 735.

Supreme Court of the United States.

OCTOBER TERM, 1911.

THE CHEROKEE NATION AND THE UNITED STATES, APPELLANTS,

VS.

MOSES WHITMIRE, TRUSTEE FOR THE FREEDMEN OF THE CHEROKEE NATION, APPELLEE.

BRIEF IN SUPPORT OF THE CONTENTIONS OF THE APPELLANTS.

May it Please the Court:

I appear for a number of persons holding commercial and departmental oil and gas mining leases on certain lands in the Cherokee Nation, allotted and patented to Cherokee Citizens by blood, but now claimed by various persons of African descent whose names appear upon the Kern-Clifton Roll of Cherokee Freedmen, sought to be established and confirmed in this proceeding.

Certain alleged Kern-Clifton claimants, who have been denied enrollment by the Secretary, have announced their purpose to institute suits to set up trusts in the allotments set apart to Cherokee Citizens by blood; upon which allotments my clients now have valuable oil and gas mining leases. In order to save themselves from annoying and vexatious litigation with these Kern-Clifton claimants, they have insisted that I, as their attorney, aid counsel for the Cherokee Nation in this appeal. My remarks shall, therefore, be brief, and merely supplementary to the able briefs on file in behalf of appellants

FIRST PROPOSITION.

The United States and the Cherokee Nation have the right of appeal from the decree of the Court of Claims, entered February 20, 1911, that decree being of such finality as renders it appealable to this court.

The decree of February 20, 1911, provides that it is "ordered, adjudged and decreed by the court that the said decree of this court passed on the third day of February, 1896, be and the same hereby is construed to vest in all the persons whose names were placed on the roll made in obedience to said decree, known as the Kern-Clifton Roll, and in their descendants born after the third day of May, 1894, and before the fourth day of March, 1907, the right of citizenship in the Cherokee Nation, and that so many of said persons and their said descendants as were living on the fourth day of March, 1907, were and are entitled to participate in the allotment of the common lands and the distribution of the common funds of said nation in the same manner and to the same extent as Cherokee Citizens of Cherokee blood or parentage may have been or may hereafter be entitled, and that in any distribution of the common lands or the common funds of said nation among the citizens thereof by distribution per capita the defendant, the Cherokee Nation, and the defendant, the United States, as trustee of the Cherokee Nation be enjoined and prohibited from making any discrimination between the said persons so placed on the said Kern-Clifton Roll and other Cherokee citizens."

The decree then proceeds to set out the Kern-Clifton Roll. The Kern-Clifton Roll was not in existence at the time the decree of February 3, 1896, was entered. The decree of the court of February 20, 1911, is based upon a supplemental petition filed by the trustee for the freedmen, the appellee, on May 6, 1908. The supplemental petition asks for relief entirely beyond that set up in the original bill or petition filed in this case, and upon which the decree of February 3, 1896, was based. The supplemental petition of May 6, 1908, set out legislation enacted by Congress after the decree of February 3, 1896, and aimed at obtaining the allotment of lands provided for by the Cherokee Agreement of 1902, and prayed

that a decree be entered by the Court of Claims establishing judicially the separate and individual rights of all those persons whose names appear upon the Kern-Clifton Roll.

This court, in *ex parte Farmers' Loan & Trust Company*, 129 U. S. Rep. 206; 32 L. Ed. 656, said:

> "But the doctrine that, after a decree which disposes of a principal subject of litigation settles the rights of the parties in regard to that matter, there may subsequently arise important matters requiring the judicial action of the court in relation to the same property and some of the same rights litigated in the main suit, making necessary substantive and important orders and decrees in which the most material rights of the parties may be passed upon by the court, and which, when they partake of the nature of final decisions of those rights, may be appealed from, is well established by the decisions of this court."

See also:

In re Michigan Central R. Co., 124 Fed. Rep. 727 (C. C. A.).

Bibber-White Co. v. *White River Valley Electric R. Co.*, 115 Fed. Rep. 787 (C. C. A.).

SECOND PROPOSITION.

The Court of Claims had no jurisdiction to entertain the supplemental petition filed May 6, 1908, and enter the decree of February 20, 1911, based thereupon.

This carries us to the jurisdictional act approved October 1, 1890. The jurisdiction of the Court of Claims in this case, as well as in all others, is purely statutory.

This court in *Price* v. *The United States*, 174 U. S. Rep. 375; 43 L. Ed. 1012, said:

> *"The jurisdiction of the Court of Claims cannot be enlarged by implication.* It matters not what may seem to this court equitable, or what obligation we may deem ought to be assumed by the Government, or the Indian tribe whose members were guilty of this depredation, we cannot *go beyond the language of the statute* and impose a liability which the Government has not declared its willingness to assume."

In *Blackfeather* v. *The United States,* 190 U. S. Rep. 369; 47 L. Ed. 1099, this court had under consideration and up for construction this very jurisdictional Act. The first section conferred "full jurisdiction * * * upon the Court of Claims subject to an appeal to the Supreme Court of the United States as in other cases, to hear and determine what are the *just rights in law or in equity* of the Shawnee and Delaware Indians, * * * under the provisions of Article 15 of the Treaty of July 19, 1866, * * * and articles of agreement made by and between the Cherokee Nation and the Shawnee Indians June 7, 1869, * * * and articles of agreement made with the Delaware Indians April 8, 1867; and also of the *Cherokee freedmen,* who are settled and located in the Cherokee Nation under the provisions and stipulations of Article 9 of the aforesaid Treaty of 1866 in respect to the *subject-matter* herein provided for."

This court, in the Blackfeather case, *supra,* held that the Court of Claims acquired no jurisdiction in a suit by an individual Delaware or Shawnee Indian, for the purpose of setting up individual rights in either the funds or lands under the treaties mentioned. This court said:

> "The language of the first section, in our opinion, confers jurisdiction upon the Court of Claims to hear and determine the rights in law or equity of the *tribes* of the Shawnee or Delaware Indians arising out of the subject-matter provided for in the subsequent parts of the Act, and there is no grant of jurisdiction to hear or determine the rights of individual members of those tribes. It is true the statute speaks of the Shawnee and Delaware Indians, but the words 'Shawnee and Delaware Indians' mean the tribe, and not individual members of those tribes of Indians. The rights must be those which arise out of the subject-matter which is referred to in Sections 2, 3 and 4 of the Act. This is stated in terms in the first section. The subsequent sections of the Act show, as we think, that Indian tribes, and not individual members thereof, are intended."

Further on, the court said:

> "The separate or joint suit mentioned in this section (meaning Section 2) is a separate or joint suit of the tribes and of the freedmen, and not of the *individual members thereof.*" (Italics ours.)

The jurisdiction, therefore, conferred upon the Court of Claims was the power to "hear and determine what are the just rights in law or in equity of * * * the Cherokee freedmen, who are settled and located in the Cherokee Nation under the provisions and stipulations of Article 9 of the aforesaid Treaty of 1866 in respect to the subject-matter herein provided for," as a *class* and not as separate individuals. In other words, the jurisdiction of the court extended to the freedmen as a class, and the Act required that the suit be brought in the name of a trustee for them as a class, and their rights were fixed as a class by the decree of February 3, 1896.

The second section of the jurisdictional act names for what such suits are to be instituted, and I contend that the court's jurisdiction is limited to a suit to recover those things specifically mentioned in the jurisdictional act, Section 2 thereof. Analyzing Section 2, we find that the freedmen, as a class, through a trustee, have a right "to begin and prosecute suit or suits against the Cherokee Nation and the United States Government to recover from the Cherokee Nation all moneys *due* either in law or equity and unpaid to the said * * * freedmen, which the Cherokee Nation have heretofore paid out, or may hereafter pay per capita in the Cherokee Nation, and which was or may be, refused to or neglected to be paid to the said * * * freedmen by the Cherokee Nation, out of any money or funds which have, or may be paid into the treasury of, or in any way have come or may come, into the possession of the Cherokee Nation, Indian Territory, *derived* from the sale, leasing or rent for grazing purposes on Cherokee lands *west* of 96 degrees west longitude and which have been or may be appropriated and directed to be paid out per capita by the Acts passed by the Cherokee Council, and for all money, lands and rights which shall appear *to be due* to the said * * * freedmen under the provisions of the aforesaid *article of the treaty* and articles of agreement."

The court, therefore, had jurisdiction to do two things only:

1st. To enter a decree adjudicating the rights of freedmen as a class under article 9 of the Treaty of July 19, 1866, made between the United States and the Cherokee Nation.

2nd. And render judgment against the Cherokee Nation and the United States for certain specified funds, and order the funds distributed.

The jurisdictional act conferred upon the Court of Claims jurisdiction to construe Article 9 of the Treaty of 1866, and define the rights of the Cherokee freedmen as a class under that Article 9. The execution of the decree of the Court of Claims thus defining the abstract rights of the Cherokee freedmen as a class was left to Congress, with respect to everything except the distribution of the moneys then due, or which may come into the possession of the Cherokee Nation, "derived from the sale, leasing or rent for grazing purposes on Cherokee lands *west* of 96 degrees west longitude, and which have been or may be appropriated and directed to be paid out per capita by the acts passed by the Cherokee Council."

The court had jurisdiction to enter a judgment distributing these funds, and whether it had jurisdicition to identify the individual beneficiaries of the judgment awarding the funds is of no importance here, because the court, in its decree of February 3, 1896, left the identification of the individual beneficiaries of the money judgment to the Secretary of the Interior.

When the Court of Claims had entered a decree construing Article 9 of the Treaty of 1866, and defining the rights of the freedmen as a class under that treaty, and entered a decree distributing the funds then subject to the judgment of the court, its jurisdiction was exhausted. It had accomplished everything that the jurisdictional act designed and intended it to accomplish. The opinion of the Court of Claims, adjudicating the abstract rights of Cherokee freedmen under Article 9 of the Treaty of 1866, was not binding on the United States, but merely advisory. *Such decree did not confer any vested property rights in those persons whose names appear upon the Kern-Clifton roll, made up by the Secretary of the Interior under the direction of the court.*

This Kern-Clifton Roll was approved by the Secretary of the Interior on January 16, 1897, nearly a year after the entry of the decree of February 3, 1896. The common domain of the

Cherokee Nation still remained the public property of the tribe as a political society. The title to all the lands of the tribe remained in the tribe as a nation, and the decree of February 3, 1896, did not operate to confer any individual property rights in the Cherokee freedmen whose names appeared upon the Kern-Clifton Roll. In fact, there is nothing in the decree of February 3, 1896, declaring that those whose names appear upon the Kern-Clifton Roll shall be allottees under any subsequent allotment act Congress might pass, or allotment agreement that Congress and the Cherokee Nation might negotiate.

The Court of Claims, in its opinion of February 20, 1911, takes the position that its decree of February 3, 1896, operated to vest a property right in all those persons whose names appeared upon the Kern-Clifton Roll, and that the court, therefore, retained jurisdiction to enforce its decree awarding those persons a property right in the domain of the Cherokee Nation. The decree had no such force. *The decree merely declared that freedmen should have the same rights in the lands of the tribe that Cherokee Citizens by blood possessed. Cherokee Citizens by blood had no individual property rights in the lands.*

In *Delaware Indians* v. *Cherokee Nation,* 193 U. S. Rep. 129-146; 48 L. Ed. 646, this court, speaking through His Honor, Mr. Justice Day, said:

> "The lands of the Cherokee Nation are not held in individual ownership, but are public lands, though held for the equal benefit of all the members. Under the patent issued to the Cherokees for their lands, whatever title conveyed was to the Cherokees as a nation, and no title was vested in severalty in any of the Cherokees."

The United States Circuit Court of Appeals for the Eighth Circuit, in *Hays* v. *Barringer,* 168 Fed. Rep. 221, held that a duly enrolled Chickasaw citizen by blood had no property interest in the lands of the tribe. Sarah Hayes, a duly enrolled Chickasaw, died in the year 1903, after enrollment. Before her death, she made a will undertaking to devise her interest in the lands of the tribe—that is, undertook to devise whatever she would be entitled to as her allotment. In speaking for the court, Judge Sanborn said:

"But was the interest of this Chickasaw Indian in these lands devisable in 1903? At that time these were the lands of the Choctaw and Chickasaw Nations, held by them, as they held all their lands, in trust for the individual members of their tribes, in the sense in which the public property of representative governments is held in trust for its people. But these were public lands, and while the enrolled members of these tribes undoubtedly had a vested equitable right to their just shares of them against strangers and fellow members of their tribe, *they had no separate or individual right to or equity in any of these lands which they could maintain against the legislation of the United States or the Indian nations.*"

To the same effect see:

Fleming v. *McCurtain,* 215 U. S. Rep. 56.
Woodbury v. *United States,* 170 Fed. Rep. 302.
Eastern Band of Cherokee Indians v. *United States and Cherokee Nation,* 117 U. S. Rep. 288-312; 29 L. Ed. 881-887.
Cherokee Nation v. *Journeycake,* 155 U. S. Rep. 196; 39 L. Ed. 120.
Cherokee Nation v. *Hitchcock,* 187 U. S. Rep. 294-299.
Stephens v. *Cherokee Nation,* 174 U. S. Rep. 445-488.
Ligon v. *Johnston,* 164 U. S. Rep. 670.
Wallace v. *Adams,* 204 U. S. Rep. 419.

In *Ligon* v. *Johnston, supra,* the United States Circuit Court of Appeals for the Eighth Circuit, speaking through Judge Hook, said:

"Whether complainants should be enrolled as citizens of the Indian nations is a political or administrative question, and none the less so because upon its determination depends the measure of their participation of the tribal property."

In *Wallace* v. *Adams,* 143 Fed. Rep. 716; 204 U. S. Rep. 419, this court and the United States Circuit Court of Appeals for the Eighth Circuit considered whether or not one Hill had any vested property right immune to subsequent legislation by the United States. Hill applied to the Dawes Commission for admission to citizenship in the Choctaw Nation. His application was denied by

the Commission, and he appealed, under the law then in force, to the United States Court. The court adjudged him to be a member and citizen of the Choctaw Tribe by blood. The decree of the court was final under the law then in force. The tribe could not appeal.

Immediately after the rendition of the decree of the United States Court, declaring him to be a citizen of the Choctaw Tribe by blood, Hill took possession of a tract of land for the purpose of selecting the same as his allotment. The law then gave him the right to select the land of which he was in possession. He went into possession and made valuable improvements, and applied to the Commission to allot him the land of which he was in possession.

In 1898, on June 28, and after his decree in the court was entered, Congress passed an Act whereby it consented to the Atoka Agreement with the Choctaw and Chickasaw Nations of April 23, 1897, empowering the Dawes Commission to allot the lands of these tribes to their members in severalty, and provided that any member should be entitled to receive his allotment out of the lands in his possession. Hill, under this Act, made his choice of the lands of which he was in possession.

Thereafter, and on July 1, 1898, Congress granted to the tribes an appeal to this court from the judgment of March 8, 1898, in favor of Hill, admitting him to citizenship in the Choctaw Nation. The Choctaw Nation appealed, and the judgment in favor of Hill and others in his class was affirmed by this court on May 15, 1899. The appeal, however, allowed by the Act of July 1, 1898, only conferred upon this court the right to determine the constitutionality and validity of the legislation affecting the citizenship and the allotment of lands.

On March 21, 1902, an agreement was made by the United States and the Choctaw and Chickasaw Nations, which was confirmed by Congress on July 1, 1902. Under this supplemental agreement, what is known as the Choctaw-Chickasaw Citizenship Court was created, and jurisdiction was conferred upon it to entertain a suit, at the instance of the tribe, against ten persons who

had been admitted to citizenship and enrolled under decrees of the United States Court in the Indian Territory, for the purpose of determining, first, whether or not notice to each nation was indispensable to the proceedings and judgments of the United States Court in the Indian Territory; second, whether the proceedings of these courts should have been confined to a review of the action of the Dawes Commission upon the record submitted to it, or extended to a trial *de novo;* and third, whether or not the judgments of the United States Courts in the Indian Territory should be annulled on account of either or all of these alleged irregularities.

In *Wallace* v. *Adams,* 143 Fed. Rep. 716, the contention was made that the Constitution of the United States had been extended over and put into effect in the Indian Territory before the legislation creating the Citizenship Court was announced, and counsel for the defendant, Hill, contended that because his judgment of admission to citizenship of March 8, 1898, was by the terms of the Act of June 10, 1896, final when it was rendered and that he took possession of and improved the land he occupied before June 28, 1898, and because by the act of the latter date the right to select this land, which was then in his possession, as his allotment was granted to him, his right thereto then vested so that Congress had no power, either by direct enactment or by the creation of a commission or court, to review or annul his judgment or to deprive him of his right to his allotment.

The United States Circuit Court of Appeals in passing on this question, among other things, said:

> "But none of the authorities cited contain a decision that one has a vested right in a judgment of citizenship which the legislative department of the United States may not lawfully disturb, though one of the ultimate consequences of such a judgment if undisturbed might be an interest in land and other property."

The court further said:

> "A striking and persuasive analogy to the power of the legislative department of the government to determine this

question of citizenship and to dispose of the lands of the tribes is found in its jurisdiction to dispose of the public lands of the United States. Congress is vested with lawful authority to dispose of these lands. It has authorized the Land Department of the United States to decide who are entitled to them under the general pre-emption, homestead and other acts provided for their disposition. But the legislative department of the United States may at any time *before* one who has occupied and improved land with a view to its pre-emption has completed *all the preliminaries* entered and paid for the land he seeks to acquire, *lawfully convey it to another* although the Land Department has already decided that the occupant is entitled to it. Occupation, improvement, compliance with the law, and the favorable decisions of the Land Department give rise to valuable and enforceable rights to public land as against *other* claimants in the absence of subsequent legislation. Nothing short of entry and payment confer upon a settler vested rights against the United States, which impair in any respect the plenary power of its legislative department to dispose of the land to another or to *withdraw* it from sale for the use of the government."

The court then proceeds to cite a long list of authorities, among others the case of *Emblem* v. *Lincoln Land Co.*, 102 Fed. Rep., 559, in which case the complainant had instituted a contest in the Land Department in the year 1888 against an entryman, Weed, to secure a cancellation of his entry, and to obtain for the contestant *the right to enter* the land which is granted by Section 2, Chaper 89, 21 Stat. L., 141, to any person who procures the avoidance of a previous entry.

It will be noticed that under the provisions of this statute the contestant upon procuring the cancellation of a former entry had the statutory right to enter the land in controversy. The court said:

> "After a long series of adverse decisions the Secretary of the Interior finally, in 1894, set aside the rulings which had been made, and directed the local land officers to hear the case anew. The complainant had paid fees to the land officers, had conducted his contest for six years, had finally

secured an avoidance of the decisions against him, and was pressing the case to a hearing before the local land officers where a time had been set for the trial, when Congress passed an act to the effect that the entry of Weed was confirmed and that a patent should be issued to him forthwith. The United States Circuit Court of Appeals for the Eighth Circuit, 102 Fed. Rep. 559, decided in accordance with the opinions of the Supreme Court of the United States therein cited, that the contestant had acquired no *vested rights* against the United States and its legislation, and that the Act of Congress which granted the land to another was neither unconstitutional nor invalid."

The court, in *Wallace* v. *Adams*, among other things, said, in referring to the act creating the Citizenship Court:

"When it was passed the Dawes Commission to whom Congress had delegated the power to distribute the lands of the tribes, had not allotted the land in dispute to the defendant. He had, therefore, acquired no vested right in it as against subsequent legislation of the United States because, until such an allotment was made, all the proceedings determinative of citizenship *and of distribution* which derived their force and effect from the legislative power of the United States alone were necessarily subject *to the further exercise of that authority*."

I, therefore, contend that citizenship remains a political question until the lands are actually allotted, and that the power of the legislative department of the Government is plenary and supreme unil some property right has vested by virtue of an actual allotment. Citizenship is not a vested property right, and has not been recognized as such by Congress.

I think Mr. Hastings has conclusively shown in his brief, from a review of subsequent legislation, that Congress has never considered that those persons whose names appeared upon the Kern-Clifton Roll obtained any property right in the lands of the Cherokee Nation. Congress has recognized that Cherokee freedmen, as a *class,* have such rights, but Congress has, by no subsequent legislation, indicated that it recognized any rights as exist-

ing in those persons whose names appear upon the Kern-Clifton Roll, unless those persons are entitled to be enrolled by the Commission under Section 21 of the Curtis Act of June 28, 1898 (30 St. L. 495).

The Act of June 10, 1896 (29 St. L. 321); the Act of June 7, 1897 (30 St. L. 83); and the Act of June 28, 1898 (30 St. L. 495); and the Original Cherokee Agreement of 1902 (32 St. L. 716); all confer upon the Dawes Commission power and authority *to make up rolls of citizenship* of the various tribes, and it would be remarkable that Congress contemplated at any time that the Court of Claims should have jurisdiction to determine who should constitute the roll of freedmen in the Cherokee Nation, while the Secretary and the Commission had authority to determine who should constitute all the other rolls of citizenship in the Five Tribes.

The Kern-Clifton Roll is no part of the decree of February 3, 1896, but, if it were a part of that decree and the Court of Claims had expressly adjudged that those whose names appeared upon that roll shall be entitled to a division of the common lands of the Cherokee Tribe, yet their rights would have been subject to Congressional legislation and Congress would have the power, especially with the concurrence of the Cherokee Nation, to refuse to be bound by the decree; the right of citizenship remained a political question and Congress had the right to repudiate the Kern-Clifton Roll at any time it saw proper.

THIRD PROPOSITION.

The Kern-Clifton Roll was never confirmed by Congress or any agreement between the Cherokee Nation and the United States, but clearly ignored and repudiated in several Acts of Congress.

I shall not review the legislation at length, because Mr. Hastings has analyzed all the legislation on this subject.

The Act of June 10, 1896, however, with respect to the duties and powers of the Commission in making rolls of citizenship, among other things, said:

"That in determining all such applications said Commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages, and customs of each of said nations or tribes: And provided further, That the rolls of citizenship of the several tribes as *now existing* are hereby confirmed, etc., etc."

The Kern-Clifton Roll was not then in existence. What Congress meant by "rolls of citizenship," as used in the Act of June 10, 1896, is declared in the Act of June 7, 1897 (30 St. L. 83). The latter Act says:

"Provided, That the words 'rolls of citizenship' as used in the Act of June 10, 1896, etc., etc., etc., shall be construed to mean the last authentic rolls of each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been *subsequently added*, either by the council of such nation, the duly authorized courts *thereof*, or the Commission under the Act of June 10, 1896."

No reference is here made to the Kern-Clifton Roll, although it had been made prior to this Act. The Secretary approved it in January, 1897. The Kern-Clifton Roll had just been completed a few months prior to this Act, and it is exceedingly strange that Congress did not approve it while it was in the frame of mind to approve rolls of citizenship.

Coming down to the Act of 1898, of June 28 (30 St. L. 495), it seems to me that this whole controversy hinges, largely, upon the construction of Section 21 of this Act. Congress directed the Dawes Commission to take the roll of Cherokee citizens of 1880, excluding the freedmen thereon, as the only roll intended to be confirmed by this and preceding Acts of Congress. Now, if this old Cherokee Roll of 1880 was the only roll Congress intended to confirm, how can it successfully be argued that this Act, by express language or by implication, confirmed the Kern-Clifton Roll

then in existence and approved by the Secretary of the Interior in January, 1897.

The Court of Claims lays considerable stress upon the words in parenthesis, to-wit, "not including freedmen," but the exclusion in confirming the roll of 1880, insofar as the freedmen thereon is concerned, is not the slightest evidence that Congress thereby confirmed the Kern-Clifton Roll approved by the Secretary in January, 1897. The failure to here mention the Kern-Clifton Roll, and to expressly confirm it, is conclusive evidence that Congress did not intend to confirm the Kern-Clifton Roll. The express confirmation of the one roll of 1880 is equivalent to the express exclusion of any intention to confirm any other rolls. In this same section Congress confirmed the Creek Roll of Freedmen, made by J. W. Dunn, and it seems strange that no confirmation can be found of the Kern-Clifton Roll.

The Court of Claims, however, bases its decision upon the following paragraph in Section 21, to-wit:

> "It shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, 1896."

Why did not Congress say that the Kern-Clifton Roll is hereby confirmed, and the Commission is directed to add the names of all persons now living who are descendants of those whose names appear upon the Kern-Clifton Roll, etc.? Take the language, however, of Section 21, so much relied upon by the Court of Claims: "It (meaning the Commission) shall make a roll of Cherokee freedmen, etc."—not adopt the Kern-Clifton Roll but "*make a roll* of Cherokee freedmen," etc.

The Century Dictionary and Encyclopedia defines the word "make" as follows:

> "To give being to; bring into existence; cause to exist as a distinct thing or entity; create, in either a primary or secondary sense; be the author of; produce: as, 'God made man in his own image;' to make a book or a will; to fashion suitably."

The Dawes Commission was, therefore, directed to produce or create, that is, *make,* a roll of Cherokee freedmen, and the directions under which the Commission should proceed were to be found by the Commission in the decree of the Court of Claims of February 3, 1896. "In strict compliance with the decree of the Court of Claims rendered the third day of February, 1896," pointed out to the Commission the place in which it would find the instructions by which it should proceed in making, or creating, or producing, or bringing into being, the roll of Cherokee freedmen.

The Century Dictionary and Encyclopedia defines the word "compliance" as follows:

> "The act of complying, yielding or consenting, as to request or desire, demand or proposal; concession, submission."

Therefore the Dawes Commission, in making and creating this roll of Cherokee freedman, was directed by the statute *not* to adopt what was done under the decree of February 3, 1896, but to *beginde novo* and do what that decree directed to be done, and do it in the manner specified by that decree. The Commission was commanded by this section to examine the decree of the Court of Claims of February 3, 1896, for directions and instructions how to ***make that roll.***

There is not a single word in the decree of February 3, 1896, about the Kern-Clifton Roll. There is not found the name of a single individual which now appears in the decree of February 20, 1911. The Court of Claims says:

> "It is apparent then that an extraordinary mistake was made in the distribution of the large sum of money then due as a result of the action of the Commissioners who made up the Kern-Clifton Roll, with the administrative approval of that roll by the Secretary of the Interior—the United States, as trustee and the Cherokee Nation consenting and the court affirming; if now it shall be made to appear that these same distributees can not be heard to claim enrollment for distributions of money and allotments of land now ready to be made."

It is entirely immaterial whether the Kern-Clifton Roll was correct or wrong; it is entirely immaterial whether there are fraudulent and unworthy names on that roll or not.

Congress was not satisfied with the roll, otherwise, it would have approved and confirmed it—especially in view of the fact that it did approve and confirm other rolls. The record, however, indicates that the Interior Department considered that the Kern-Clifton Roll contains many names which should not be upon the roll of Cherokee freedmen.

It is sufficient, however, to say that, instead of adopting, or approving, or confirming *what was done* by the Commissioners appointed by the court and the Secretary in the decree of February 3, 1896, Congress commanded the Dawes Commission to *make* the roll. Congress, in this Act of 1898, expressly commands the Dawes Commission to make the roll called for by the decree of February 3, 1896, and I contend that the Dawes Commission was required to examine that decree of February 3, 1896, and nothing else.

When the Dawes Commission had examined that decree and ascertained its directions, and then proceeded, it had performed its duties as directed by the Act of Congress. The Commission was commanded to make a role *de novo*, in strict compliance with the decree of the Court of Claims of February 3, 1896. This is just as obvious as if Congress had set out in *haec verba* the directions the Court of Claims gave in its decree of February 3, 1896. The Dawes Commission, when this Act of 1898 was passed, before it proceeded to make the roll of Cherokee freedmen, was required to read the decree of the Court of Claims of February 3, 1896, as if all that part of the decree giving instructions as to how to make the roll had been set out in the Act of 1898.

FOURTH PROPOSITION.

The Court of Claims has no jurisdiction to decide whether or not the Dawes Commission and the Secretary of the Interior have made a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims of February 3, 1896.

The decree of the Court of Claims of February 3, 1896, as shown by the able argument of Mr. Hastings and the counsel for the United States in this case, served its purpose long before the Act of 1898 and long before the Cherokee Treaty of 1902, providing for the allotment of the lands of the nation in severalty among the members of the tribe.

That part of the decree of February 3, 1896, designating how the roll of freedmen should be made, was not revivified or rehabilitated or resuscitated by the Act of Congress of June 27, 1898, or the Cherokee Agreement of 1902. That part of the decree, giving directions as to how the freedmen roll should be made, became by that Act a part of the legislation of Congress and did not operate judicially in its nature or continue to exist as a judicial decree adjudging how the rolls should be made, but continued to exist as a legislative direction. In other words, Congress simply adopted the directions given in that decree, and made all that part of the decree, giving directions as to how the roll should be made, legislative in its effect and not judicial. And the Dawes Commission did not proceed to make a Roll of Cherokee Freedmen under order of the Court of Claims, but under order and direction of Congress.

FIFTH PROPOSITION.

The Dawes Commission had authority and jurisdiction to hear and determine who were entitled to be enrolled as Cherokee freedmen, and its decision, whether right or wrong, on the facts submitted, is not void, is not a nullity, and is not subject to review by the courts.

The various Acts of Congress, reviewed by counsel for the appellants, clearly show that the Commission had been given complete jurisdiction to decide who were entitled to be enrolled.

In *United States ex rel., West* v. *Hitchcock,* 205 U. S. Rep. 82; 51 L. Ed. 720, this court had under consideration an application for mandamus against the Secretary of the Interior. It was sought by the petition for mandamus to require the Secretary of the Interior to approve the selection and taking of 160 acres by the relator out of the lands ceded to the United States by the Wichita Band of Indians, under the Agreement of June 4, 1891. The Secretary responded and set up his decision, "that the relator was not a member of the tribe, and therefore had denied the application" of relator. Speaking through Mr. Justice Holmes, the court said:

> "The approval of the Secretary, required by the agreement, must include, as one of its elements, the recognition of the applicant's right. If a mere outsider were to make a claim, it would have to be rejected by someone, and the Secretary is the natural, if not the only, person to do it. No list or authenticated determination of the parties entitled is referred to by the agreement, so as to narrow the Secretary's duty to identification or questions of descent in case of subsequent death. The right is conferred upon the members of the bands, but the ascertainment of membership is left wholly at large. No criteria of adoption are stated. The Secretary must have authority to decide on membership in a doubtful case, and if he has it in any case, he has it in all."

The jurisdiction to determine who were entitled to be enrolled upon the freedmen roll, as well as upon all the other rolls, necessarily had to be confided to some tribunal or commission. The powers of the Commission and the Secretary were at least *quasi* judicial. Necessarily so, because the Commission was required, from time to time, to pass on issues of fact, and was given power to summons witnesses, and hear testimony, and administer oaths.

Kimberlin v. *Commission,* 104 Fed. Rep. 654-662.

In this instance, it seems to us that the decision of this court in *United States* v. *California & Oregon Land Co.,* 148 U. S. Rep. 32; 37 L. Ed. 358, is very pertinent. There was under con-

sideration an Act conferring upon the Governor of the State power to determine when certain things had been done, that is—certain sections of the railroad completed—which Act reads:

> "When the Governor of said state shall certify to the Secretary of the Interior that any continuous ten miles of said road are completed, then another quantity of land hereby granted, not to exceed thirty sections, must be sold, and so from time to time until said road is completed."

The Governor had made such certificate. It was contended that the certificate was false, and that therefore no title had passed to the land in question. It was contended that the proceedings were a nullity, absolutely void. Speaking through Mr. Justice Brewer, this court said:

> "Now it is familiar law that when jurisdiction is delegated to any officer or tribunal, his or its determination is conclusive. Thus in the case of *United States* v. *Arredondo*, 31 U. S. 6 Pet. 691, 729 (8 L. Ed. 547), the court said: 'It is an universal principle that, where a power of jurisdiction is delegated to any public officer or tribunal over a subject-matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject-matter; and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming the right under the acts done, and the public, or any person denying its validity, are, power in the officer, and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer; executive, legislative, judicial, special, unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law.'"

Mr. Justice Brewer cites, in support thereof, the following cases:

> "*Foley* v. *Harrison*, 15 How. 433.
> *Johnson* v. *Towsley*, 13 Wall. 72.
> *St. Louis, etc.* v. *Kemp*, 104 U. S. Rep. 636.
> *Shepley* v. *Cowan*, 91 U. S. Rep. 330.

Moore v. *Robbins,* 90 U. S. Rep. 530.
Quimby v. *Conlan,* 104 U. S. Rep. 420.
Steele v. *St. Louis, etc.,* 106 U. S. Rep. 447.
Lee v. *Johnson,* 116 U. S. Rep. 48.
Wright v. *Roseberry,* 121 U. S. Rep. 488."

Section 21 of the Act of Congress of 1898, expressly declares that "the rolls so made, when approved by the Secretary of the Interior, *shall be final* and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to the tribal laws, shall alone constitute the several tribes which they represent."

Likewise, the Act of March 3, 1891 (31 St. L. 1073), declares that "the rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent, etc."

In *Ligon* v. *Johnston,* 164 Fed. Rep. 670, the United States Circuit Court of Appeals for the Eighth Circuit, speaking through Judge Hook, said:

> "For many years the power to determine who were and who were not citizens of these tribes was left exclusively to the tribal authorities; names were added to and stricken from the rolls at will; and when Congress, to end the arbitrary practice, intrusted the power to administrative officers of the Government who had no private interest to subserve it did not change that which was of a purely political character into a subject-matter for the intervention of the courts."

As to whether a class of individuals was entitled to be enrolled has at all times remained a political question and subject to the plenary power of Congress. As to whether or not any particular individual of a designated class is entitled to be enrolled is a question Congress delegated to the Dawes Commission and the Secretary of the Interior. The determination of such questions necessarily involves the exercise of judgment and discretion partaking of a judicial nature. The Commission was created and organized to pass on these issues and clothed with power and juris-

diction. Having jurisdiction to decide the questions, it necessarily had jurisdiction to decide, erroneously as well as correctly, with respect to the application of any particular individual. Jurisdiction includes the power to decide erroneously as well as correctly.

Hine v. *Morse*, 218 U. S. Rep. 493-507.

Flanagan v. *Chapman & Dewey Land Co.*, 144 Fed. Rep. 371.

Foltz v. *St. Louis & S. F. R. Co.*, 60 Fed. Rep. 316.

The whole question of jurisdiction was reviewed by this court in *Noble, Secretary* v. *Union River Logging Railroad Co.*, 147 U. S. Rep. 165; 37 L. Ed. 123.

I, therefore, submit that the judgment of the Court of Claims of February 20, 1911, is subject to review by this court on the appeal allowed, and that such judgment should be reversed and set aside.

The Kern-Clifton Roll has never been approved by Congress, and has not only not been approved by Congress, but Congress has repeatedly refused to confirm it. The Dawes Commission was directed to make or create, or produce, a roll of the Cherokee freedmen in accordance with the directions set forth in the decree of the Court of Claims of February 3, 1896. The Court of Claims had no power or jurisdiction, under the jurisdictional Act of 1890, to determine whether or not the Dawes Commission made a roll of Cherokee freedmen in strict compliance with its decree of February 3, 1896.

That part of the decree of February 3, 1896, giving directions as to how the Cherokee freedmen roll should be made, was simply adopted by Congress in the Act of 1898, and became legislative in its force and effect and remained a legislative direction. The decree was not a judicial direction to the Dawes Commission, and in making up the roll in accordance with the directions of that decree and in strict compliance with that decree, the Dawes Commission *was not acting under any authority derived from the Court of Claims, and was not acting as a Commission appointed by the Court of Claims.*

The Dawes Commission obtained all of its authority from Acts of Congress, and derived no power or authority from the decree of the Court of Claims. It was not responsible to the Court of Claims, nor subject to the orders of the Court of Claims. The decree of the Court of Claims pertinent was made by the Act of Congress of 1898 *legislative*. Congress simply adopted the directions given in that decree, and, therefore, the Commission was acting under the directions of Congress, and not under the directions of the Court of Claims.

For these reasons, I respectfully submit that the decree of the Court of Claims of February 20, 1911, should be reversed.

Respectfully,

GEO. S. RAMSEY,
By Permission of the Court.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1884.

No. 735.

THE CHEROKEE NATION *vs.* THE UNITED STATES (CONGRESS)

vs.

MOSES WHITMIRE, TRUSTEE FOR THE CHEROKEE NATION.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEES.

SAMUEL L. PUTNAM,
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Attorneys for Appellees.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 735.

THE CHEROKEE NATION AND THE UNITED STATES, APPELLANTS,

vs.

MOSES WHITMIRE, TRUSTEE FOR THE FREEDMEN OF THE CHEROKEE NATION.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEES.

Statement of the Case.

This is an appeal from a supplemental decree of the Court of Claims directing the enforcement of a final decree of the same court passed some fourteen years earlier, which was a consent decree, and from which no appeal was taken.

The circumstances leading up to the litigation and the history of the litigation itself are, briefly stated, as follows:

In

On July 19, 1866, the United States and the Cherokee Nation entered into a treaty which was promulgated August 11, 1866 (14 Stat. L., 798), the 9th article of which provided: .

> "That all freedmen [of the Cherokee Nation] who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native-born Cherokees."

By the 15th article of said treaty it was also provided that:

> "The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of 96 degrees, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States," etc., etc.

And by the 20th article of said treaty it was also provided that:

> "Whenever the Cherokee national council shall request it, the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and allotted among them, at the expense of the United States."

Following this treaty, and in consequence of it, the Cherokees amended their constitution, so that it was provided by section 2 thereof (Rec., p. 27) that:

> "The lands of the Cherokee Nation shall remain common property until the national council shall request the survey and allotment of the same, in accordance with the provisions of article 20 of the treaty of the 19th of July, 1866, between the United States and the Cherokee Nation."

And it was provided by section 5 thereof that:

> * * * "All native-born Cherokees, all Indians, and whites legally members of the Nation by adoption, and all freedmen who have been liberated by voluntary act of their former owners or by law, as well as free colored persons who were in the country at the commencement of the rebellion and are now resident therein, or who may return within six months from the 19th day of July, 1866, and their descendants who reside within the limits of the Cherokee Nation, shall be taken and deemed to be citizens of the Cherokee Nation" (Rec., p. 27).

On the 8th day of April, 1867, the Cherokees and the Delawares, with the approval of the President of the United States, entered into a treaty by which the Cherokees sold to the Delawares—

> "for their occupancy, a quantity of land east of the line of the 96° west longitude, in the aggregate equal to 160 acres for each individual of the Delaware tribe who has been enrolled upon a certain register made February 18, 1867, by the Delaware agent, and on file in the Office of Indian Affairs, being the list of Delawares who elected to remove to the 'Indian country,' * * * and in case the Cherokee lands shall hereafter be allotted among the members of the Nation, it is agreed that the aggregate amount of land herein provided for the Delawares to include their improvements according to the legal subdivisions when surveys are made (that is to say 160 acres for each individual) shall be guaranteed to each Delaware incorporated by these articles into the Cherokee Nation. * * * On the fulfillment by the Delawares of the foregoing stipulations, all the members of the tribe registered as above provided, shall become members of the Cherokee Nation, with the same rights and immunities, and the same participation (and no other) in the national funds as native-born citizens, save as hereinbefore provided. * * * And the children hereafter born of such Delawares, so incorporated in the Cherokee Nation, shall in all respects be regarded as native Cherokees."
>
> Delawares *vs.* Cherokees, 193 U. S., pp. 129, 130, 132; 28th C. C. R., 287.

On the 7th day of June, 1869, the Cherokees entered into a similar treaty with the Shawnees, by which the latter Indians became incorporated in the Cherokee Nation, the essential difference between their case and that of the Delawares being that they paid into the treasury of the Cherokees a lump sum and did not receive any guarantee as to the use, occupancy, and allotment of any particular lands (Blackfeather's case, 155 U. S., p. 218).

That these arrangements converted the freedmen, Delawares, and Shawnees into citizens of the Nation has never been questioned, but the idea had long existed among the Cherokees that citizenship did not necessarily extend to or invest in the citizen a personal or individual interest in the common property (Rec., p. 30).

There was, however, no immediate occasion for the assertion of this idea, and for more than a decade the freedmen, Delawares, and Shawnees were accepted and recognized by the Cherokees as Cherokee citizens without any more specific definition of their rights.

By the act of March 3, 1883 (22 Stat. L., p. 603, chap. 143), Congress appropriated to the Cherokee Nation $300,000.00 in payment for some of its lands, and thereafter up to about the year 1890 various sums came into the treasury of the Cherokee Nation from the lease of grazing lands, etc., and as these sums were to be distributed per capita among the Cherokee citizens, the idea was advanced by Cherokees of the blood that they alone were entitled to participate in this distribution. In accordance with this idea the national council, by an act approved April 27, 1886, provided:

> "That the phrase 'all rights of native Cherokees,' as used in the 9th and 15th articles of the treaty of July 19, 1866, between the United States and this Nation, is hereby construed to mean the individual rights, privileges and benefits enjoyed by white adopted citizens of this Nation before and at the making of said treaty, and who had been by law admitted to 'all the rights of a native Cherokee, civil, political,

> and personal,' as subjects of the Cherokee Nation of Indians, without acquiring any right or title to the Cherokee domain or to the proceeds thereof," etc., etc. (Rec., p. 30).

And following the principle declared by this legislation the Nation distributed its funds per capita among the Cherokees of the blood to the exclusion of the freedmen, Delawares, and Shawnees.

By act of October 19, 1888 (25 Stat. L., 609, chap. 1211), Congress appropriated $75,000.00 to be distributed by the Secretary of the Interior among the freedmen, Delawares, and Shawnees, for the purpose of equalizing them with the per capita payments previously made by the Cherokee Nation to Cherokee citizens of the blood, said sum to be a lien on the Cherokee lands west of the Arkansas river. And in carrying out the terms of this appropriation the Secretary of the Interior had a roll of the freedmen of the Cherokee Nation made, as of March 3, 1883 (Rec., p. 63), which is known in the record and in this brief as the "Wallace roll." As a basis for the beginning of this Wallace roll the Cherokee Nation had furnished the Secretary of the Interior a census roll of the freedmen taken by the Nation in 1880, which is known in the record and in this brief as the "Authenticated Cherokee roll."

Jurisdictional Act of 1890.

This recognition by Congress of the rights of the freedmen, Delawares, and Shawnees, and this distribution of $75,000 among them, failed to settle the controversy, and Congress, by act of October 1, 1890 (26 Stat. L., p. 636, chap. 1249; Rec., p. 14), conferred upon the Court of Claims full jurisdiction—

> "to hear and determine what are the just rights in law or in equity of the Shawnee and Delaware Indians, * * * and also of the Cherokee freedmen,

who are settled and located in the Cherokee Nation under the provisions and stipulations of article 9 of the aforesaid treaty of 1866, in respect to the subject-matter herein provided for.

"SEC. 2. That the said Shawnees, Delawares and freedmen shall have a right, either separately or jointly, to begin and prosecute a suit or suits against the Cherokee Nation and the United States Government to recover from the Cherokee Nation all moneys due either in law or equity and unpaid to the said Shawnees, Delawares, or freedmen, which the Cherokee Nation have before paid out, or may hereafter pay, per capita, in the Cherokee Nation, and which was or may be, refused to or neglected to be paid to the said Shawnees, Delawares, or freedmen by the Cherokee Nation, out of any money or funds which have, or may be paid into the treasury of, or in any way have come, or may come, into the possession of the Cherokee Nation, Indian Territory, derived from the sale, leasing or rent for grazing purposes on Cherokee lands west of 96 degrees west longitude, and which have been, or may be, appropriated and directed to be paid out per capita by the acts passed by the Cherokee council, *and for all moneys, lands and rights* which shall appear to be due to the said Shawnees, Delawares or freedmen under the provisions of the aforesaid articles of the treaty and articles of agreement.

"SEC. 3. That the said suit or suits may be brought in the name of the principal chief or chiefs of the said Shawnee and Delaware Indians, and for the freedmen and in their behalf, and for their use in the name of some person as their trustee, to be selected by them with the approval of the Secretary of the Interior," etc., etc.

The parties thus enabled elected to bring separate suits, and the Delawares brought their suit in the name of their principal chief, Charles Journeycake; the Shawnees in the name of their principal chief, Johnson Blackfeather, and the freedmen in the name of their duly selected and approved trustee, Moses Whitmire.

In this petition Whitmire prayed for a decree—

> "establishing the said proportionate right, interest, title, and share of said freedmen of the Cherokee Nation in the said lands now known as the Cherokee Reservation, and in the said lands now known as the Cherokee Outlet, and that the said freedmen of the Cherokee Nation may be found and decreed to be seized of and to have and enjoy proportionate rights, interests, titles, and shares in all of the said last-named lands, known as the Cherokee Reservation and the said Cherokee Outlet, and the interests of the Cherokee Nation therein" (Rec., p. 7).

with additional prayers that the freedmen be allowed to participate in the funds of the Nation, whether theretofore paid out to their exclusion or thereafter to be paid. And the prayers of the Delawares and Shawnees in their petitions were similar in their scope and purpose.

On the 12th day of June, 1893, the Court of Claims passed its decrees in the Journeycake and Blackfeather cases, granting the same relief in each case, and the following is an extract from the decree in the Journeycake case (28 C. Cls. R., 320):

> "And it is further adjudged and decreed that the claimants in this suit and those whom they represent, being citizens of the Cherokee Nation, of Delaware blood or parentage, be adjudged and decreed to be entitled to participate hereafter in the common property of the Cherokee Nation in the same manner and to the same extent as Cherokee citizens of Cherokee blood or parentage may be entitled, and that in the distribution of the proceeds and avails of the public domain, or common property of the Nation among the citizens thereof, by distribution per capita at any time hereafter, the defendants the Cherokee Nation, and the defendants the United States as trustees of the Cherokee Nation, be enjoined and prohibited from making any discrimination between Cherokee citizens of Cherokee blood or parentage and Cherokee citizens of Delaware blood or parentage, to the injury or prejudice of the latter."

And in addition these decrees provided for the immediate payment to Delaware and Shawnee citizens per capita of sums sufficient to equalize them with the per capita payments previously made by the Cherokee Nation to Cherokee citizens of the blood.

These cases were appealed to this court, and on the 19th day of November, 1894, this court affirmed in each case the decree of the court below (Journeycake's case, 155 U. S., p. 196, and Blackfeather's case, *id.*, p. 218).

It may be well to explain here that that portion of the Cherokee lands lying east of 96 degrees and occupied by the Nation is referred to in the record as the "Cherokee Reservation." Certain lands lying west of 96 degrees and belonging to the Nation are known as the "Cherokee Outlet."

Pending the final adjudication of these cases, the Cherokee Nation sold to the United States the lands remaining to them in the Cherokee Outlet (act of March, 1893, 27 Stat. L., 612, chap. 209) for the sum of $8,595,736.00, with the proviso that a sufficient amount of money should remain in the Treasury of the United States until the status of the Delawares, Shawnees, and freedmen should be determined by the courts before which their suits were then pending (Rec., p. 37).

On the 3d day of May, 1893, Whitmire, as trustee for the freedmen, filed in the Court of Claims an amended petition, praying that they be allowed to participate in the distribution of this "Cherokee Outlet" money, and, after the mandates of this court had come down to the Court of Claims, Journeycake and Blackfeather filed motions in their cases to have their decrees extended to include this fund, and the court allowed these motions (30 C. Cls. R., 172).

On the 14th day of February, 1895, the Cherokee Nation filed its answer to the original and amended petitions in the Whitmire case, *nunc pro tunc,* as of December 19, 1894 (Rec., p. 24). On the 19th day of December, 1894, the case was submitted to the court, after argument (Rec., p. 27),

and on May 8, 1895, the court rendered a decree finding that the freedmen were entitled to participate in the Cherokee national funds and common property, in the same manner and to the same extent as Cherokees of the blood.

It was further decreed that the roll of such freedmen, known as the Wallace roll, should be taken as showing the number and identity of such freedmen, and the Secretary of the Interior was directed—

> "to cause the 'Wallace roll' aforesaid to be further corrected by adding thereto descendants born since March 3, 1883, and prior to May 3, 1894, striking therefrom the names of those who have died or have ceased to be citizens of the Cherokee Nation between the aforesaid dates, so that when thus amended and changed it shall represent the number of freedmen, free colored persons, and their descendants aforesaid entitled to participation in the distribution of the fund now awarded to the complainant" (30 C. Cls. R., 180).

Neither party was satisfied that the "Wallace roll" was the true list of freedmen and free colored persons entitled to participate in the common property of the Cherokee Nation, the freedmen claiming that it failed to include many of them who were entitled to participate, and the Cherokee Nation insisting that it included persons not entitled to participate, and on June 20, 1895, the Nation and the United States joined in a motion for a rehearing, and also filed an application for an appeal to this court, and on July 23, 1895, the claimant also filed an application for an appeal. On January 30, 1896, the above applications of the defendants and the claimant were withdrawn by leave of the court, and on February 3, 1896, the decree entered May 8, 1895, was, upon the application of all the parties, vacated, and a new decree, to which all the parties had consented, was entered (Rec., p. 36). The language of this decree in defining the

status of the freedmen was identical with that used in the decrees in the Journeycake and Blackfeather cases:

> "That the complainants in this suit and those whom they represent, being the freedmen and free colored persons aforesaid, and their descendants living and in being on the 3rd day of May, 1894, are entitled to participate hereafter in the common property of the Cherokee Nation in the same manner and to the same extent as Cherokee citizens of Cherokee blood or parentage may be entitled, and that in the distribution of the proceeds and avails of the public domain or common property of the nations among the citizens thereof by distribution per capita at any time hereafter, the defendant, the Cherokee Nation, and the defendant, the United States, as trustee of the Cherokee Nation, be enjoined and prohibited from making any discrimination between the Cherokee citizens of Cherokee blood or parentage and Cherokee citizens who are or were freedmen who had been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the Cherokee country at the commencement of the rebellion, and were residents therein at the date of such treaty, or who returned thereto within six months thereafter, and their descendants, to the prejudice of the latter" (Rec., pp. 38-39).

This decree further provided as a substitute for the adoption of the "Wallace roll," as provided in the first decree, that—

> "The Secretary of the Interior be authorized to appoint three Commissioners, one on the nomination of the complainant and one on the nomination of the defendant, the Cherokee Nation, but both nominations to be approved by him, to proceed to the Cherokee country and hear the testimony both for and against the identity of all freedmen, free colored persons and their descendants, claiming to be entitled to share in the distribution of said $903,365.00 that may be offered by the respective parties to this suit; and that each of said parties shall be entitled to be

represented before said Commissioners, either at the taking of the testimony in the Cherokee country or elsewhere; and that the said Commissioners in ascertaining the identity of the freedmen entitled to share under this decree shall accept what is known as the 'Authenticated Cherokee roll,' the same now being on file in the office of the Secretary of the Interior, having been furnished to him and purporting to have been taken by the Cherokee Nation in 1880, for the purpose of showing the number of freedmen then entitled to citizenship in the said Nation under the terms of the treaty between the United States and the Cherokee Nation, hereinbefore referred to, and their descendants; and the said Commissioners shall ascertain who of said persons named on said roll were alive, and what descendants of said persons were alive on May 3, 1894, and no evidence shall be accepted by said Commission tending to disprove the citizenship of any of the persons whose names appear upon said roll" (Rec., pp. 39-40).

And it was further provided that when the foregoing roll was approved by the Secretary of the Interior, he was, after deducting costs and expenses, to distribute among the freedment thus identified the amount remaining of the fund of $903,365.00, ascertained to be the amount then ready for distribution among the freedmen.

On February 15, 1896, the Secretary of the Interior asked the court for a construction of the decree:

1. As to whether the six months' limitation to return applied to the freedmen as well as the free colored persons; and

2. As to whether the six months' period ran from July 19 or August 11, 1866.

And on February 18, 1896, the court passed an order declaring that the limitation of six months applied both to the freedmen and free colored persons, and that the period extended to February 11, 1867. On February 20, 1896, the Secretary of the Interior appointed William Clifton as his

own selection, and Robert H. Kern, upon the nomination of the freedmen, and William B. Thompson upon the nomination of the Cherokees, Commissioners, as provided in the decree (Rec., p. 61). On July 14, 1896, Mr. Kern presented to the court a petition asking the court to instruct the Commissioners as follows (Rec., p. 44):

> "If it shall appear to said Commission that any person or persons of the aforesaid class had been taken from the Cherokee Nation during the rebellion, either by the owners thereof, or was absent therefrom during said time because of his or their belonging to either of the armies that were engaged in the late rebellion, and were unable to return to the Cherokee Nation within six months after the conclusion and ratification of the treaty referred to in the decree in said cause, of date July 19, 1866, because of circumstances beyond their control, but returned as soon as practicable, then no such person shall be excluded by said Commission from the roll to be prepared by it, but the same shall be placed thereon, as well as the descendants of such."

And on April 15, 1896, this petition was by the court denied.

These Commissioners proceeded to the Cherokee Nation, and about the end of the year 1896 reported a roll of freedmen and free colored persons who were alive and in being on May 3, 1894, and their descendants, entitled to citizenship in the Nation, which is known in the record and in this brief as the Kern-Clifton roll. At their sittings in the Nation, the Nation itself was represented by counsel; the report to the Secretary of the Interior was signed by all three of the Commissioners, making it an unanimous report, and on January 16, 1897, it was approved by the Secretary of the Interior, and thereafter the funds were distributed to the persons whose names were on said roll (Rec., pp. 108-113).

II.

Curtis Act.

While these matters were progressing in the Court of Claims and in this court Congress was engaged in perfecting arrangements for the extinction of the tribal governments of the Five Civilized Tribes and the distribution and partition of their funds and public domain among their citizens. The act of March 3, 1893 (27 Stat. L., 612, chap. 209), provided in section 16 for the appointment of a commission, which is known in the record and in this brief as the Dawes Commission, to negotiate with these tribes for this purpose.

As a result of the work of this Commission, the act of June 28, 1898 (30 Stat. L., 495, chap. 517), was passed little more than a year after the distribution under the Kern-Clifton roll above set out was completed. This act, commonly known as the "Curtis act," provided for allotment by the Dawes Commission of the lands belonging to the Cherokee Nation (among other Indian nations) to the citizens thereof.

By section 11 it was provided that:

* * * * * * *

"When such allotment of the lands of any tribe has been by them completed, said Commission shall make full report thereof to the Secretary of the Interior for his approval:

* * * * * * *

"*Provided further,* That whenever it shall appear that any member of a tribe is in possession of lands, his allotment may be made out of the lands in his possession, including his home, if the holder so desires."

* * * * * * *

And by section 21 the Commission was directed to make a roll of Cherokee citizens in the following manner:

> "SEC. 21. That in making a roll of citizenship of the several tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take the roll of Cherokee citizens of 1880 (not including freedmen), as the only roll intended to be confirmed by this and preceding acts of Congress, and to enroll all persons now living whose names are found on said roll, and all descendants born since the date of said roll to persons whose names are found thereon; and all persons who have been enrolled by the tribal authorities, who have heretofore made permanent settlement in the Cherokee Nation, whose parents, by reason of their Cherokee blood, have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to citizenship under Cherokee laws.
>
> "It shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six."

Further legislation controlling the Dawes Commission were the acts of May 31, 1900 (31 Stat. L., 221, chap. 598), and the acts of July 1, 1902 (32 Stat. L., p. 716, chap. 1375), which did not vary the terms of section 21 of the act of 1898, above set out, in any manner material to this issue. The act of 1902 provided that the roll of citizens of the Cherokee Nation should be made as of September 1, 1902, and that no child born thereafter to a citizen and no white person who has intermarried with a Cherokee citizen

since the 16th day of December, 1895, should be entitled to enrollment or participation in the distribution of the tribal property.

Early in the year 1900 the Dawes Commission began the work of making the Cherokee roll, as required by section 21 of the Curtis act (Rec., p. 80), and were engaged in this until early in the year 1907.

The act of April 26, 1906 (34 Stat. L., 137, chap. 1876) further directed the Dawes Commission in the matter of their work, and provided that the roll of the Cherokee Nation should be made as of March 4, 1906, instead of September 1, 1902.

As shown above, the Court of Claims had already decided (Rec., p. 44) that persons who had not actually returned to the Nation within six months were not entitled to the benefits of the 9th article of the treaty of July 19, 1866, no matter what excuse they had for their absence.

The Dawes Commission, acting in accordance with the opinion of the Assistant Attorney General for the Interior Department, had placed upon the rolls Charles Foreman, who had not returned within six months because, it was alleged, he had been upon a diplomatic or quasi-diplomatic mission to Washington (Rec., p. 73), and other cases of a similar nature had been acted on or were being considered by the Commission, so that the then counsel for the Cherokee Nation, who is one of the counsel now, drew and procured to be included in the act of April 26, 1906, section 3, which provides that the roll of freedmen shall include—

> "only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants who were actual, personal, *bona fide* residents of the Cherokee Nation August 11, 1866, or who actually returned and established such residence in the Cherokee Nation on or before Feb. 11, 1867."
>
> Rec., p. 230.

The Dawes Commission finally completed a roll of the citizens of the Cherokee Nation, which included a separate roll of the freedmen and free colored persons who were, according to its ruling, entitled to citizenship in the Nation and participation in the distribution of its property, and these rolls were finally approved by the Secretary of the Interior March 4, 1907.

In making up this roll of freedmen and free colored persons, neither the Dawes Commission nor the Secretary of the Interior attempted to make it "in strict compliance with the decree of the Court of Claims."

The last per capita distribution made exclusively to Cherokees of the blood (the Cherokee outlet money) had been by act of their council of May 3, 1894 (Rec., p. 38). The decree determined and declared that—

> "the complainants in this suit and those whom they represent, being the freedmen and free colored persons aforesaid, and their descendants *living and in being on the 3d day of May,* 1894, are entitled to participate hereafter in the common property of the Cherokee Nation in the same manner and to the same extent as Cherokee citizens of Cherokee blood or parentage may be entitled," etc., etc.,
>
> Rec., p. 38.

thus vesting the right in living individuals whose identity could be and was ascertained in the manner further provided by the decree.

In ascertaining the identity of these persons the Commissioners, acting under the decree, were to hear the testimony and determine the claims of all freedmen and free colored persons in the Nation, without regard to any previous enrollment, with the sole limitation that they were to accept—

> "the authenticated Cherokee roll, the same now being on file in the office of the Secretary of the Interior, having been furnished to him and purporting to have been taken by the Cherokee Nation in 1880,

for the purpose of showing the number of freedmen then entitled to citizenship in the said Nation under the terms of the treaty between the United States and the Cherokee Nation, hereinbefore referred to, and their descendants; and the said Commissioners shall ascertain who of said persons named on said roll were alive and what descendants of said persons *were alive on May* 3, 1894, and no evidence shall be accepted by said Commission tending to disprove the citizenship of any of the persons whose names appear upon said roll."

Rec., p. 40.

On May 11, 1900, the Secretary of the Interior sent to the "Dawes Commission" a letter of instructions concerning this decree, in which he said:

"A roll was made under this decree, known as the 'Clifton roll,' which was approved by this Department in 1897. It has been claimed that said roll contains many names not properly belonging there, but whether this fact influenced Congress to disregard that roll and direct that a new one be made in strict compliance with said decree is immaterial, for the fact remains that the decree alone is to be taken as a guide for making the roll which your Commission is to prepare.

"The roll of 1880, made by the Cherokee Nation, is to be accepted by you as conclusive of the right of all persons whose names are found thereon and of their descendants to be enrolled by you. Your only duty in relation thereto is to ascertain who of the persons named therein are alive and who of their descendants are alive, and place their names on your roll, omitting, however, all who have forfeited or abjured their citizenship."

Rec., p. 72.

And thereafter the Dawes Commission carried on an original investigation as to the rights of the various colored people in the Nation and made their own determinations, utterly ignoring the decree of the court and the roll of col-

ored citizens made under it. They excluded more than a third of the persons from the Dawes roll who had been judicially ascertained by the Kern-Clifton Commission to be citizens of the Nation, and they included in the Dawes roll persons who had not been included in the Kern-Clifton roll.

Supplemental Petition.

As soon as this action became public the freedmen of the Cherokee Nation who were enrolled as citizens of the Nation under the decree of February 3, 1896, and who were denied citizenship by the Dawes Commission, held a public meeting at Lenapah for the purpose of asserting their rights under the decree of the Court of Claims of February 3, 1896.

Since the decree their trustee, Moses Whitmire, had died, and they nominated in his stead Jacob B. Wilson, and Wilson applied to the Court of Claims to be appointed trustee and to be permitted to file a supplemental petition praying for the enforcement of the decree of February 3, 1896, so as to include those persons who were on the Kern-Clifton roll and who were omitted from the Dawes roll, in the distribution and allotment of the common property and public domain of the Cherokee Nation, and on April 20, 1908, this application was allowed (Rec., pp. 45-46-47).

Accordingly, on May 8, 1908, the appellees filed their supplemental petition, which, after briefly reciting the facts above set out, prayed the court to decree that the—

> "action of the said Dawes Commission and the Secretary of the Interior whereby the names of said freedmen were excluded from the roll and citizenship of the Cherokee Nation be declared to be unlawful, and further enjoining and prohibiting the defendants, the Cherokee Nation, and the United States, as trustee for the Cherokee Nation, from making any discrimination between the said freedmen and other citizens of the Cherokee Nation in the allotment of lands and distribution of the said property and assets of said

Nation, and further enjoining the said defendant, and particularly the United States acting through the Secretary of the Interior, from further disturbing said freedmen in the possession and occupation of their said homes and improvements, and further enjoining upon the said defendant, the United States acting through the Secretary of the Interior, to reinstate such of said freedmen as have heretofore been ousted from the occupancy and possession of their said homes and improvements."

Rec., p. 52.

Thereafter the Attorney General filed in the Court of Claims a statement of the case by the Interior Department (Rec., p. 192) substantially agreeing with this statement, but concluding with the following denial:

* * * * * * *

"It is probable that most, if not all, of the land held by freedmen claimants who were rejected has been allotted to duly enrolled citizens of the Cherokee Nation. The Secretary of the Interior and the officials under his direction have not 'ousted' freedmen claimants 'from their homes,' nor are they 'now preparing to oust the remainder of said freedmen (claimants) from their said homes.' On the other hand, the Secretary of the Interior long ago instructed the United States Indian agent, who has jurisdiction, under the direction of the Secretary of the Interior, of the matter of placing allottees in the Cherokee Nation in the possession of their allotments (see section 21 of the act of July 1, 1902), to not proceed to remove from land in the Cherokee Nation claimants for enrollment as Cherokee freedmen whose claim for citizenship was, in anywise, pending, nor is any action now being taken by the United States Indian agent to place Cherokee allottees in possession of land now being held by persons who claimed freedmen citizenship in the Cherokee Nation whose enrollment was denied, but who may be parties to, or affected by, this case."

Rec., p. 199.

And later, at the instance of the appellees, the Secretary of the Interior filed in the court a list of freedmen, some 1,800 in number, whose names appear on the Kern-Clifton roll and who are not identified on the final roll of freedmen citizens of the Cherokee Nation approved by the Secretary of the Interior March 4, 1907—that is, the "Dawes roll" (Rec., p. 202)—with the additional statement that none of them had been found by the Dawes Commission to have forfeited or abjured his or her citizenship in the Cherokee Nation after May 3, 1894 (Rec., p. 200).

The Attorney General then filed as evidence for the defendants a mass of papers from the Interior Department contained in this record from pages 53 to 192, both inclusive. From pages 75 to 192 this matter consists entirely of extracts from the annual reports of the Dawes Commission, and individual and class decisions of the Dawes Commission upon the applications of various freedmen to be admitted to the Dawes roll, the materiality of which to this controversy we are not quite able to see, since there is no disagreement as to what course the Dawes Commission actually pursued. The case was finally submitted to the Court of Claims on the supplemental petition, and on February 20, 1911, the court handed down an opinion (Rec., p. 235) and passed a decree in which it was ordered, adjudged, and decreed—

> "that the said decree of this court passed on the third day of February, 1896, be, and the same hereby is, construed to vest in all the persons whose names were placed on the roll made in obedience to said decree, known as the Kern-Clifton roll, and their descendants born after the third day of May, 1894, and before the fourth day of March, 1907, the right of citizenship in the Cherokee Nation," etc.

This decree continued by reciting the names of the persons on the Kern-Clifton roll who were omitted from the Dawes roll, as shown by the records of the Interior Department (Rec., pp. 202-212), and concluded in this language:

"It is therefore further ordered, adjudged, and decreed that the Secretary of the Interior be, and he hereby is, enjoined and directed to place upon the roll of citizens of the Cherokee Nation, authorized and directed by the acts of June 28, 1898, July 1, 1902, and April 26, 1906, the names of as many of the said freedmen and free colored persons and the names of as many of their descendants, born after the 3d day of May, 1894, and before the 4th day of March, 1907, as may have been living on the 3d day of March, 1907.

"It is further ordered, adjudged, and decreed that the Secretary of the Interior be, and he hereby is, enjoined and directed to pay to each of the said persons so placed on the said final roll of citizens of the Cherokee Nation their proportionate share of any monies belonging to the said Nation that may have been, since June 28, 1898, or may hereafter be, distributed per capita, among the citizens of said Nation, and to allot to each of them their proportionate share of the lands of said Nation, and in taking said allotments each of said persons shall have the same rights, immunities, and privileges in the matter of homestead selections and in all other respects as has been or is provided by law for other citizens of said Nation."

Rec., pp. 235-246.

On March 30, 1911, the defendants filed an application for an appeal to this court. On May 15, 1911, they filed a motion to withdraw the application for appeal, which was allowed by the court on the same day, and on the same day they filed a motion for a new trial, which was overruled by the court June 5, 1911 (Rec., p. 247). On June 17, 1911, the defendants filed an application for an appeal to this court "from the decree rendered in the above-entitled cause on the 20th day of February, 1911," and on the same day this application was allowed.

ARGUMENT.

The Purpose and Scope of the Jurisdictional Act of 1890.

The act of October 1, 1890 (Rec., p. 14), was not intended to procure from the Court of Claims and from this court a mere academic statement of principles, but to confer the full jurisdiction of courts of equity to hear, determine, and *enforce* valuable property rights of individuals. It was not intended that the individuals composing the freedmen, Delawares, and Shawnees should recover merely their individual shares of the moneys theretofore paid in exclusion of them, but that they should have a decree insuring their participation, not merely as a class, but as individuals, in any moneys which the Nation "may hereafter pay per capita," and the jurisdiction was not limited to the distribution of moneys but extended as well to the lands of the Nation, the ultimate allotment of which in severalty had long been contemplated, as will be seen by the provision in the 20th article of the treaty of July 19, 1866 (14 Stat., 798). And it was not intended to limit the adjudication to lands west of 96 degrees, but to give to the freedmen, Delawares, and Shawnees a decree for their individual property rights in "all moneys, lands, and rights which shall appear to be due" them. The controversy had never been in respect of political rights, but always in respect of property. It had resisted every administrative and legislative effort to settle it and the time had come to invoke the aid of the courts.

The Cherokee council had passed its act of April 26, 1886, distributing a fund per capita among Cherokees of the blood to the exclusion of freedmen, Delawares, and Shawnees. Congress had met this by its act of October 19, 1888 (25 Stat. L., 609, chap. 1211), appropriating $75,000.00 to be paid to the freedmen, Delawares, and Shawnees per capita, so as to equalize them with the payments made to the Chero-

kees, and had declared this sum to be a lien upon certain Cherokee lands. Of course, the validity of such a lien was still a question open to controversy.

Congress then passed its act of October 1, 1890 (Rec., p. 14), conferring upon the Court of Claims full jurisdiction to adjudicate and enforce all rights of all the parties concerned. But this did not settle the controversy.

Another fund had already come into the treasury of the Nation, and the council, undeterred by the acts of Congress, above cited, passed its act of November 25, 1890 (Rec., p. 38), again distributing the fund per capita to the Cherokees of the blood to the exclusion of the freedmen, Delawares, and Shawnees. And even after the Court of Claims had decided the Delaware and Shawnee cases (Journeycake's case, 28 C. C. R., p. 320), and while the appeals were pending in this court, the "Cherokee outlet" money came into the treasury of the Nation and the council passed its act of May 3, 1894, distributing this also per capita among the Cherokees of the blood to the exclusion of the freedmen, Delawares, and Shawnees (Rec., p. 38).

It is now contended in this case that the jurisdiction of the Court of Claims conferred by the act of October 1, 1890, was intended to be limited to the barren statement of the rights of the freedmen as a class. This, we shall contend, is not correct. First, because the Court of Claims *is a court* with jurisdiction to pass and *enforce* decrees, and not a mere commission to give opinions or recommendations to the heads of executive departments (Gordon's case, 117 U. S., 697; Anderson's case, 9 Wall., 56); and, second, because such a feeble, empty jurisdiction could not have settled the controversy entrusted to the court to be settled. In fact, it was never possible to settle the controversy by anything short of the adjudication of individual rights, and this has been fully shown by the course of the litigation in this case.

The first decree of the court of May 8, 1895, declared the general principle governing the rights of the freedmen and

from B to C. If the Court of Claims had no authority to inquire into the execution of its judgments, it was shorn of a part of the ordinary jurisdiction of a court."

Curtis Act Does Not Take Away the Jurisdiction of the Court of Claims.

But it is now contended in this case that the jurisdiction over this matter conferred on the Court of Claims by the act of October 1, 1890, was repealed by the act of June 28, 1898 (30 Stat. L., 495, chap. 517), and July 1, 1902 (32 Stat. L., 716, chap. 1375), and April 26, 1906 (34 Stat. L., 137, chap. 1876).

The act of 1898 was an act providing for the distribution of the funds and public domain of the Five Civilized Tribes per capita, among their citizens, and for the final dissolution and extinction of the tribal governments.

For this purpose it was necessary that rolls of citizenship of the several tribes be made, and the 21st section of the act provided specifically how these rolls should be made by the Dawes Commission. But a short time before this court and the Court of Claims had decided that the freedmen, Delawares, and Shawnees were citizens of the Cherokee Nation, with all the rights of Cherokees of the blood. The Cherokees had never made any question as to the identity of the individuals composing the Delaware and Shawnee tribes, while in the case of the freedmen this question had been the very storm center of litigation, and with knowledge of this Congress directed the Dawes Commission, in making up the roll of Cherokee citizens, "not including freedmen," to take the last known roll, to wit, the census roll of 1880, as correctly enumerating all the various citizenship of the Cherokee Nation *except the freedmen*. The reasons for excepting the freedmen are apparent. Hardly more than a year had passed since the distribution of nearly a million dollars to the freedmen had been completed under the direction of the Court

of Claims in the Whitmire case. An old and bitter dispute had apparently been finally settled by the intervention of the court and the consent of the parties. Any direction to the Dawes Commission to reopen the question and make a new roll would have started afresh the ancient controversy. The Kern-Clifton Commission had identified about 4,500 freedmen as being the persons entitled to participation under the decree of the court (Rec., p. 113). Many of these were living upon their homesteads, to which they would have a preferential right to allotment whenever allotment was made (Rec., p. 199). It seems to us clear, therefore, that Congress in excepting the freedmen from the general provisions for making a roll of the Cherokees, had the definite purpose to continue to confide their rights to the jurisdiction and protection of the courts, and with these facts in view, it seems to us not hard to understand why Congress should have provided that the Dawes Commission should—

> "make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, 1896."

And this view of the matter is sustained by the declaration of the Committee of Indian Affairs of the House of Representatives, who formulated and reported the Curtis act. The report says:

> "Provision has heretofore been made for the making of rolls of citizenship of the various tribes, but the commission authorized to do the work is of the opinion that to do equal justice to all concerned they should have additional authority, and we believe this measure provides for the settlement of the question of citizenship, so that when the rolls are made the interest of all concerned will have been fully protected and this vexed and important question will be settled forever.
>
> "The Mississippi Choctaws, the Delawares, the freedmen of the various tribes, claim certain rights

> which we do not attempt to settle in this bill, but in it provision is made to protect all interests the courts may find they have."
>
> House of Representatives Report No. 593, 55th Cong., 2d Session.

This statement of the committee must have referred to the freedmen of the Cherokee Nation, because there was at that time no controversy pending in the courts as to any other freedmen in the Five Civilized Tribes.

The Curtis act certainly did not repeal the jurisdiction of the Court of Claims in express terms, and if it operated as a repeal it did so by mere implication, and the implication must be construed out of the direction to the Dawes Commission to make the roll of freedmen "in strict compliance" with the decree of the Court of Claims.

An old and bitter controversy had come into the courts respecting the rights of the individual freedmen to be recognized as members of the Cherokee Nation entitled to participation in the distribution of its common property and public domain.

After nearly six years of patient labor the court had adjudicated about 4,500 freedmen to be entitled to this participation. All the parties concerned had accepted this adjudication as final and had supposed the controversy to be ended. The freedmen had each received his share of the money distributed and was in the quiet possession of his homestead, secured to him by a decree which gave him the right to have it allotted to him whenever the public domain of the Nation should be divided in severalty, and it seems to us clear that the purpose of the Curtis act was to perpetuate and not to destroy these conditions.

If this court shall decide that the Curtis act was designed to repeal the jurisdiction of the Court of Claims, it will decide that these labors of the court and the parties were in vain, and that the freedmen took by the decree of the Court

of Claims no more than a mere opinion binding upon no one as to their property rights in the Nation.

As was said by the opinion in the court below (Rec., p. 231):

> "It is elementary that repeals by implication are not favored. They are never admitted where former directions can stand with the new act, but only where there is positive repugnancy between the two and where both acts cannot be reconciled."
>
> U. S. *vs.* Greathouse, 166 U. S., 601.

And further (Rec., p. 226):

> "It is apparent, then, that an extraordinary mistake was made in the distribution of the large sum of money then due as the result of the action of the commissioners who made up the Kern-Clifton roll, with the administrative approval of that roll by the Secretary of the Interior—the United States, as trustees, and the Cherokee Nation consenting and the court affirming—if now it shall be made to appear that these same distributees cannot be heard to claim enrollment for distributions of money and allotments of land now ready to be made."

And further (Rec., p. 228):

> "Where parties are rightfully entitled to judicial redress and there is confessedly no other jurisdiction into which they can go, the court having the parties before it already, should continue to exercise jurisdiction and should not interpose doubts and artificial refinements to save itself from the responsibility of decision."

The act of July 1, 1902 (32 Stat. L., 716, chap. 1375), did not, so far as this controversy is concerned, vary the terms of the Curtis act. In its 27th section it merely repeated the directions given in the Curtis act for making the rolls.

Purpose of the Act of 1906.

Neither is there any implication of repeal in the 3d section of the act of April 26, 1906 (34 Stat. L., chap. 137, 1876), which provides that the roll of freedmen shall include—

> "only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants who were actual, personal, *bona fide* residents of the Cherokee Nation August 11, 1866, or who actually returned and established such residence in the Cherokee Nation on or before Feb. 11, 1867."

In enforcing the decree of February 3, 1896, the Kern-Clifton Commission had been in doubt about their right to admit certain persons who had not actually returned because they had been prevented in various ways not in their control, and the language of the decree itself had been such as to raise the question whether freedmen as well as free colored persons were subject to limitation of residence or return and had also left in doubt whether the six months expired January 19, 1867, or February 11, 1867. These doubts had been resolved by the decretal order of the court of February 18, 1896 (Rec., p. 60), and the language of the said section of the act of April 26, 1906, is almost identical with the language of that decretal order.

The 3d section was inserted into the act of 1906 through the efforts of the counsel for the Cherokee Nation, because the Dawes Commission in violation of the decree of this court was placing upon its rolls certain freedmen or free colored persons who were not residents or who did not return within the time prescribed, because for one reason or another they were held to be constructive residents or to have constructively returned (Rec., p. 230). It certainly requires a wide stretch of the imagination to presume that Congress, by the act of 1906 intended to take away the juris-

diction of the court by using language requiring the Dawes Commission to obey the terms of the court's decree and by using the very definitions which had their origin in the decretal order of this court subsequent to and construing the decree of February 3, 1896, using language which defined the rights of freedmen and free colored persons to be the same, and language which fixed the date of the expiration of six months at February 11, 1867, instead of January 19, 1867. And if there could be any sort of doubt about this it seems to us to be fully answered by the proviso to the 18th section of the same act, which is in these words:

> *Provided,* That proceedings to which any of said tribes is a party pending before any court or tribunal at the date of dissolution of the tribal governments shall not be thereby abated or in anywise affected, but shall proceed to final disposition.

Thus it is evident that Congress had not departed from the purpose first adopted. It had confided the rights of these freedmen to the protection of the court and was continuing to rely upon the court to thereafter define and protect them.

The Amendment Proposed to the Curtis Act.

It is also asserted that an amendment proposed to the Curtis act, when it was being considered in the Senate, and rejected by that body, shows the intention of Congress to repeal the jurisdiction of the Court of Claims.

We are not familiar with any canon of construction that permits a rejected amendment to define the purpose of an act of Congress, and should feel inclined to pass this contention without comment if the scope and purpose of the amendment had not been, unwittingly we are sure, but nevertheless earnestly and persistently, misrepresented. An examination of this proposed amendment to the Curtis act (Rec., p. 70) discloses that its purpose was not to confirm the Kern-

Clifton roll—that is to say, to secure obedience to the decree of the Court of Claims by restricting the freedmen to those persons found upon the Kern-Clifton roll, but to open the door to those freedmen who had been found by the Kern-Clifton Commission not to be entitled to citizenship. If the amendment had been accepted by Congress it would have been the duty of the Dawes Commission to place on its rolls not only those names found on the Kern-Clifton roll, which would have been "in strict compliance with the decree of the court," but to add to the Kern-Clifton roll—

> "the names of all persons who applied before the Commission that made the roll of freedmen in said case (Kern-Clifton) and whose names were not placed upon either said roll or the rejected roll of freedmen made by said Commission in said case, if in their (Dawes Commission) judgment, the evidence offered before said Commission to the Five Civilized Tribes justified their being made citizens of the Cherokee Nation in accordance with the provisions of said decree."

If this amendment had been adopted jurisdiction would have been taken away from the Court of Claims because the Dawes Commission, instead of making its roll "in strict compliance with the decree of the court," could have made it to be what, in their judgment, the Court of Claims, with the machinery which it had used, ought to have made it. If this amendment is valuable in the present consideration of the case, its value is to show that it was not the purpose of Congress to take jurisdiction away from the court.

The Second Delaware Case.

It is also contended here that the authority given by the 25th section of the Curtis act to the Delawares to bring a new suit must be taken to indicate the intention of Congress to treat the entire jurisdiction of the Court of Claims under the act of 1890 as exhausted.

For some reason, which cannot now be known, counsel for the Delawares in Journeycake's case confined themselves to asserting the right of all the members of the Delaware tribe in the common property of the Nation, and the decree in that case did not, therefore, extend to the special and peculiar rights which would remain, under the Cherokee-Delaware agreement, in such original or "registered" Delawares as might be surviving when the property should come to be distributed, though the right was recognized in the Journeycake case in the opinions both of this court and of the Court of Claims. It was these special rights that were settled in the second Delaware case (193 U. S., 127), and it seems plain that if they had been asserted they would have been settled in the first case. But since the omission had been made in the first case, further jurisdictional legislation may have been necessary. In the freedmen case, however, we are not asking to have *new* rights defined and established, but to have *old* and established rights enforced, and for this purpose we insist the jurisdiction of this court is unimpaired, and there is nothing in the second Delaware case obnoxious to this contention.

The Dawes Commission Not a Judicial Body.

It is also contended that the Dawes Commission was a judicial and not an administrative or ministerial body, and in support of this contention appellants rely on Buffington's case (not reported, but reprinted in Annual Rep. Com'r Indian Affairs, 1904, part 2, p. 161) and Kimberlin's case (104 Fed., 716).

Buffington's case was instituted by the chief of the Cherokees to compel the Secretary of the Interior to confine the Dawes Commission to the enrollment of those freedmen whose names were on the census or "authenticated roll" of 1880, which would have been in violation of the decree of the Court of Claims. Judge Raymond very properly dis-

missed the bill. His opinion that the jurisdiction of the Court of Claims had ended was *obiter dicta* and not in any way necessary to the decision of the case.

Kimberlin's case seems to be relied on because Judge Sanborn in that case says in his opinion that the Dawes Commission is invested with judicial powers, and we suppose it is to be inferred that if the Dawes Commission was a part of the judiciary of the United States its jurisdiction superseded that of the Court of Claims. The attention of the court is called to a later opinion of Judge Sanborn in Wallace *vs.* Adams (143 Fed., 726), in which he defines the Commission to be a part of the executive branch of the Government. This case was affirmed by this court (204 U. S., 415). Upon this question the court below said in this case (Rec., p. 228):

> "The Dawes Commission was subordinate to the Secretary of the Interior, and was merely one of the agencies given to enable him to perform the duties of his office. The duties of the Secretary were ministerial, inasmuch as he was directed to make up a roll of a slightly different date, but 'in strict compliance with the decree of the Court of Claims.' The subordinate agency relied upon to carry out the Secretary's own ministerial work could not be judicial if his work was merely ministerial, as we think it was."

Goldsby's Case.

It is also contended that since Congress has provided that the action of the Secretary of the Interior in approving the Dawes rolls shall be "final," the court may not disturb it. The Secretary *finally* approved the Dawes rolls without including Goldsby, who thereupon sought by mandamus to compel the Secretary to place his name on the rolls, notwithstanding the fact that they had been *finally* approved. The court below granted the prayers of the petition and

ordered the Secretary to enroll Goldsby, and this judgment was affirmed by this court (Garfield *vs.* Goldsby, 211 U. S., 249). In the opinion Mr. Justice Day used this significant language:

> "In our view this case resolves itself into a question of the power of the Secretary of the Interior in the premises, as conferred by the acts of Congress. We appreciate fully the purpose of Congress in numerous acts of legislation to confer authority upon the Secretary of the Interior to administer upon the Indian lands, and previous decisions of this court have shown its refusal to sanction a judgment interfering with the Secretary where he acts within the powers conferred by law. But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and if the Secretary has exceeded the authority conferred upon him by law then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action."
>
> See also Turner *vs.* Fisher, present term.

Our answer to the contention of counsel is found in this opinion. The Secretary of the Interior and the Dawes Commission were directed by the 21st section of the act of 1898 to obey the decree of the court. Their refusal to do so was the exercise of "arbitrary and unwarranted" power, and it was not only within the power of the Court of Claims "to restore the status of the parties aggrieved," but it was its imperative duty to do so.

Conclusion.

It therefore seems clear to us that when Congress sent this controversy to the Court of Claims it was for the purpose of having every possible phase of it settled in accordance with established principles of justice, and for that purpose it conferred upon the court the full powers of a court of equity.

It is not easy for us to conceive or we think possible to find in the Curtis or any subsequent act or acts a congressional purpose to nullify and set aside this jurisdiction and destroy almost as soon as it was finished the great work of the court. We do not believe that it was intended by the "Curtis act" to authorize the Dawes Commission or the Secretary of the Interior to take away from more than a third of the freedmen the homes and property which the court after patient investigation had just given them.

The decree of the court and the roll made under it had been consented to and accepted by all the parties concerned, and the controversy was at an end. Surely it was not the purpose of Congress to unsettle these happy conditions.

We believe, on the contrary, that the true construction of this legislation of Congress was given by the learned judge who announced the opinion of the court below (Rec., p. 227):

> "We are bound to presume that the Kern-Clifton roll was made in compliance with the decree, because the decree was entered by consent, and because the Cherokee Nation and the beneficiaries whose names appeared on that roll entered into an agreement for distribution to be made under it. As a matter of fact, distribution was made under it, and there is nothing to show that the Kern-Clifton roll was ever questioned until the supplemental petition had been filed herein. If the payment by the Secretary of the Interior was a 'compliance' with the provision of the decree for the payment of money, the refusal of the Dawes Commission to allow these same persons to participate in the common property, as further provided in the decree, is not a 'strict' compliance, nor for that matter a compliance of any kind."

And further (Rec., p. 228):

> "The provisions of these two acts of Congress which follow the specific direction relating to freedmen are merely directory; that is, they relate to the duties of officers and not to the rights of parties. There is no

legislative intent apparent to take away the judicial ascertainment of legal rights of the parties and submit them to the future *ex parte* action of administrative officers. These provisions must be kept subordinate to the chief purpose of the statute and interpreted 'in strict compliance' with the preceding section and 'with the decree of the Court of Claims.' The Dawes Commission was not a judicial body. No party was sure of a hearing before it; its action was subject to the approval of an executive officer, and its legislative object was not to ascertain rights, but to assist individuals to obtain rights already existing. It was in legal effect a designation of administrative officers to do administrative work."

And finally (Rec., p. 234):

"In requiring the Dawes Commission to adhere strictly to the decree of this court in making a roll there is no indication that the appropriate remedy may not be invoked if it reasonably appears that there has been a departure from the directions of Congress. Certainly where two special jurisdictions appear to have been created by acts of Congress for special purposes, one of them possessing judicial power in a constitutional sense and the other not invested with that kind of power, it would seem that persons whose rights are affected should have the benefit of an investigation in the forum where the judicial investigation may be had. If there be a doubt as to the right of the Court of Claims to carry out the original and repeated intention of Congress respecting these freedmen, they should have the benefit of such doubt."

We therefore respectfully submit that the decree of the Court of Claims should be affirmed.

SAMUEL A. PUTMAN,
CHARLES POE,
ROBERT H. KERN,
Attorneys for Appellee.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 735.

THE CHEROKEE NATION AND THE UNITED STATES, APPELLANTS,

vs.

MOSES WHITMIRE, TRUSTEE FOR THE FREEDMEN OF THE CHEROKEE NATION.

APPEAL FROM THE COURT OF CLAIMS.

MOTION OF APPELLEE TO DISMISS THE APPEAL.

Comes now the appellee, by Robert H. Kern, Samuel A. Putman, and Charles Poe, his attorneys, and moves the court to dismiss this appeal for the want of jurisdiction under subdivision 4 of rule 6 of this court, upon the following grounds:

1. Because on the third day of February, 1896, the Court of Claims passed its decree by consent of all the parties to this cause, by which all the rights of all parties in and to the

subject-matter in controversy were fully and finally determined, and the said decree was a final decree, from which no appeal was prosecuted to this court.

2. Because the decree passed in this court on the twentieth day of February, 1911, from which this appeal is prayed, was merely in the nature of an execution of said decree of February third, 1896, and defined no new rights in the parties to this proceeding, but sought merely to enforce rights already established and consented to.

3. Because although the decree of February twentieth, 1911, was regularly entered on that day the appeal in this cause to this court was not allowed and prosecuted until the seventeenth day of June, 1911, which is more than ninety days after the entry of said decree on said twentieth day of February, 1911.

ROBERT H. KERN,
SAMUEL A. PUTMAN,
CHARLES POE,
Attorneys for Appellee.

It is hereby stipulated and agreed that the above motion to dismiss the appeal may be submitted to the court on Monday, December 11, 1911, and argument had thereon when the case is heard upon its merits.

ROBERT H. KERN,
SAMUEL A. PUTMAN,
CHARLES POE,
Attorneys for Appellee.
JOHN Q. THOMPSON,
Attorney for the United States.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 735.

THE CHEROKEE NATION AND THE UNITED STATES, APPELLANTS,

vs.

MOSES WHITMIRE, TRUSTEE FOR THE FREEDMEN OF THE CHEROKEE NATION.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE APPELLEE IN SUPPORT OF HIS MOTION TO DISMISS.

The act of October 1, 1890 (26 Stat. L., 626), which conferred jurisdiction upon the court in this case, provides for appeal to the Supreme Court of the United States as in other cases.

On May 8, 1895, upon an agreed statement of facts, the Court of Claims rendered an opinion and passed a decree construing said act, defining its jurisdiction thereunder, and determining the rights of all the parties to the cause to the moneys, lands, and common property of the Cherokee Nation. This decree was not wholly satisfactory to any of the parties, and therefore they all prayed appeals therefrom to the Supreme Court of the United States. Subsequently the

parties entered into negotiations with each other and agreed upon the terms of a decree which would be satisfactory to them all.

On February 3, 1896, all the parties withdrew their several appeals to the Supreme Court of the United States from the decree of May 8, 1895, and consented to the passage of the decree of February 3, 1896. This consent decree ascertained, defined, and determined all the rights of everybody in the entire subject-matter of the controversy, and provided machinery for the identification of the freedmen entitled to rights in the lands, assets, moneys, and common property of the Cherokee Nation, whether then or thereafter to be distributed, and under this decree, and the machinery provided by it, with the consent of everybody in interest, the portion of the estate then ready for distribution, amounting to nearly one million ($1,000,000) dollars, was distributed to the freedmen, who had thus been identified and whose rights were thus established. Since the passage of that decree another and final distribution of the same estate to the same individuals has been authorized.

The Court of Claims has found that this final distribution is not being made in conformity with its said decree of February 3, 1896, and by its decree of February 20, 1911, it has ordered the defendants to conform with and obey the original decree. From this latter decree the United States prays an appeal, and we contend that there is not and cannot be any right of appeal from a decree of this character.

The Decree of February 3, 1896, Was a Final Decree.

The decree of 1896 decided and determined that

> "the freedmen and free colored persons aforesaid and their descendants living and in being on the 3d day of May, 1894, are entitled to participate hereafter in the common property of the Cherokee Nation in the same manner and to the same extent as Cherokee citizens of Cherokee blood of parentage,"

and in obedience to the decree the Kern-Clifton Commission ascertained and determined who were the "persons aforesaid and their descendants, living and in being, on the 3d day of May, 1894." The present decree is no more than an additional direction, made necessary by the disobedience of the defendants, that these same persons shall have these same rights. It is therefore no more than a decree in execution of the original decree, and from it no appeal can lie.

In the present opinion (page 16) the Court of Claims says:

> "The supplemental petition of the freedmen does not seek to have new rights defined, but does seek to have established rights enforced."

The case of Carr *vs.* Hoxie (13 Pet., 460) was one where the court below had decreed the sale of property. From this decree an appeal had been taken to the Supreme Court which had been dismissed for want of prosecution. Thereafter another appeal was taken from the same decree. After this second appeal the court below passed a decree in execution of the original decree, and from this a third appeal was taken. The record in the third appeal reached the Supreme Court before that in the second. In an opinion by Mr. Justice Story, the court reserved the right to pass upon the merits of the second appeal whenever it should reach its docket, and dismissed the third appeal because it was taken from the decree of sale, and said:

> "The supplemental decree of sale is but a decree in execution of the original decree, and not a final decree in the contemplation of the acts of Congress from which an appeal like that now before us lies."

The second appeal seems to have been abandoned, for it is nowhere reported.

In the case of Callan *vs.* May (2 Black, 541) the court below had passed a decree among other things ordering the sale of property.

At the sale May became the purchaser. Callan refused to surrender possession of the land. Upon the application of May the court below passed a decree putting him in possession. Callan petitioned the Supreme Court, as the practice then was, for an appeal, and it was allowed on special allocatur by Mr. Justice Wayne. On motion of May, this appeal was dismissed, with an opinion by Mr. Chief Justice Taney, from which we quote the following extracts:

> "The proceedings in the Circuit Court after its decree was affirmed in the case of Statham, Smithson & Co. *vs.* Callan *et al.*, were nothing more than proceedings required to carry into execution that decree.
>
> * * * * * * *
>
> "The order of the court directing process to issue is not such a final order or decree in a case as the act of 1789 contemplates.
>
> * * * * * * *
>
> "The allocatur of a single judge certainly cannot enlarge the appellate powers of this court beyond the limits prescribed by law, and that law does not authorize an appeal from an order directing execution to issue to enforce a judgment."
>
> * * * * * * *

It therefore seems clear to us that no appeal may be taken from the decree of February 20, 1911, and if this is deemed to be an application for an appeal from the original decree of February 3, 1896, it seems equally clear that it cannot be allowed.

First, because that decree was passed more than fifteen years ago; second, because by its terms it was a consent decree, and third, because when it was entered, all the parties waived their right of appeal to the Supreme Court of the United States in express terms.

It has been repeatedly held by the Supreme Court of the

United States that no appeal will lie from a decree entered by consent. It is sufficient to refer to the case of

Pacific Railroad *vs.* Ketchum, 101 U. S.,

which is the leading case upon the subject, and to the case of

United States *vs.* Babbitt, 104 U. S., 767,

where it was distinctly held that even the United States is bound by a consent decree, and its appeal will not be entertained.

The consideration for the waiver of the appeal and the consent to the passage of the decree of February 3, 1896, was full. This consideration consisted of an agreement by everybody, for the modification of the terms of the decree, passed by the court on the 8th of May, 1895. The decree of February 3, 1896, was a final decree, settling the rights of all the parties in the property, and the subsequent decree of February 20, 1911 (the one now sought to be appealed from), is nothing but a mode of executing the original decree, like the award of an execution at law.

Whiting *vs.* Bank, 13 Peters, 6-15.

> "A decree which determines the whole controversy between the parties, leaving nothing to be done except to carry it into execution, is a final decree for the purpose of appeal, and none the less so that the court retains the fund in controversy for the purpose of distributing it as decreed."
>
> Lewisburg Bank *vs.* Sheffey, 140 U. S., 445.

In the case of Mackey *vs.* Kelso, 59 Md., 485, a controversy arose over the construction of certain clauses of a last will, and a bill was filed for their interpretation. While the controversy was pending the parties, by their solicitors, entered into a consent decree, by which they also waived their right of appeal, and a partial distribution of the estate was then made. Several years after, when the time for the final distribution of the estate had arrived, an auditor's account

was stated, making final distribution in accordance with the terms of this consent decree, and the court held:

> "The waiver of the right to appeal from the decree, excluded the right to appeal from the order finally confirming the auditor's report, distributing the residue of the estate in conformity to the decree."

As to the Decree of February 20, 1911.

The decree of February 20, 1911, was, as has been said, merely a supplemental decree for the purpose of enforcing the rights established by the decree of February 3, 1896, but, even as to that, the application for the appeal from it was not taken within the time prescribed by law. Appeals from the Court of Claims to this court must be taken within ninety days from the entry of the judgment or decree in that court (Rev. Stat., section 1086). This was not done in the present case, the decree having been entered on the 20th of February, 1911, and the application for the appeal not having been filed until June 17, 1911 (Rec., p. 248). After the decree of February 20, 1911, was passed and entered, the defendants, on March 30, 1911, filed an application for appeal to this court. On May 15, 1911, the defendants filed a motion to withdraw the application for appeal, which was allowed by the court on May 15, 1911, and on May 15, 1911, the defendants filed a motion for a new trial (Rec., p. 247). On June 5, 1911, this motion for a new trial was overruled by the court (Rec., p. 247), and, as has just been stated, the application for the present appeal was made and allowed by the court on June 17, 1911.

On the 19th of December, 1894 (Rec., p. 27), this case was fully argued in the Court of Claims and submitted. All the rights of the parties in the subject-matter of controversy were fully discussed, and, by the decree of February 3, 1896, consented to by all parties, their rights were fully adjudicated and ascertained.

On January 20, 1908, the motion to substitute Jacob Wilson as trustee for the freedmen of the Cherokee Nation for Moses Whitmire, deceased, and to file the supplemental petition was argued (Rec., p. 47), and on April 20, 1908, this motion was granted. All the questions involved were fully presented at this argument.

On May 6, 1908, the supplemental petition was formally filed, and after the Department of the Interior furnished the lists of freedmen to the court, as shown on pages 202-215 of the record, the case was fully argued on March 1 and 2, 1909 (Rec., p. 215).

March 29, 1909, claimant was allowed to proceed under his supplemental petition (Rec., p. 215).

On May 17, 1909, the defendants filed a motion for a rehearing of the order granting such leave (Rec., p. 215). On November 15, 1909, this motion was fully argued, both of these arguments involving a full rehearing of the controversy on all its points. On May 2, 1910, this motion for rehearing was overruled. On May 31, 1910, the defendants filed another motion for a rehearing, which was argued fully again on October 19, 1910, and, after that argument, the court passed the decree of February 20, 1911, now complained of (Rec., p. 215).

We submit, in support of this motion to dismiss, that there is no rule of this court, or of the Court of Claims, which prevents the running of the time limited within which an application for an appeal may be made, merely because parties see fit to file motions for rehearing. The law fixes the time within which an appeal may be prosecuted, we submit, and that time begins to run when the judgment or decree sought to be reviewed is entered in the Court of Claims. It seems to us that the conduct of the defendants in this case in retarding its progress by repeated motions for rehearing and new trial presents a striking illustration of the wisdom of such a rule. If application had been made in the lower court to stay the entry of this decree pending a motion for a

new trial, doubtless the Court of Claims would have had the right to grant such an application, but no such motion was made, and we therefore submit that the appeal was not taken in due time, even if it should be conceded, for the sake of the argument, that the decree of February 20, 1911, be a decree from which an appeal would lie.

Respectfully submitted,

ROBERT H. KERN,
SAMUEL A. PUTMAN,
CHARLES POE,
Attorneys for Appellee.

[14566]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 735.

THE CHEROKEE NATION AND THE UNITED STATES,
Appellants.

vs.

MOSES WHITMIRE, TRUSTEE FOR THE FREEDMEN OF THE CHEROKEE NATION, *Appellees.*

BRIEF ON BEHALF OF INDIVIDUAL CHEROKEES BY BLOOD, FILED BY CHARLES M. RICE, ATTORNEY, AS AMICUS CURIAE.

By leave of this Honorable Court first had and obtained, counsel appears as amicus curiae and presents, at the solicitation of a very large number of Cherokee Indians of the blood, this brief in opposition to the claim of the Freedmen who are the appellants here.

The United States has averred certain errors which counsel adopt and to which they desire to make no addition.

These assignments of error present to this court among other things:

1. The question whether the Court of Claims has jurisdiction to award the decree complained of;

2. The question whether the appellees, who were the claimants below, are not guilty of such laches in the presentation of their claim as should repel them from this court.

It is only to these two propositions that this brief is directed.

By the 9th Article of the Treaty of 1866 between the United States and the Cherokees, the latter

> "agree that all Freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees." (14 Stat. 799, 801.)

On October 1, 1890, Congress passed an act conferring jurisdiction on the Court of Claims of certain claims of the Cherokee Freedmen. (26 Stat., p. 636.) By Section I of this act it is provided that jurisdiction is conferred upon the Court of Claims, subject to an appeal to the Supreme Court of the United States, to hear and determine what are the just rights in law or in equity, of the Cherokee Freedmen who are settled and located in the Cherokee Nation, under the provisions and stipulations of Article 9 of the Treaty above referred to "in respect to the subject-matter herein provided for."

By Section II of the Act the subject matter is thus defined:

> "That the said * * * Freedmen shall have a right * * * to begin and prosecute a suit or suits against the Cherokee Nation and the United States Government to recover from the Cherokee Nation all moneys due either in law or in equity and unpaid to the said * * * Freedmen, which the Cherokee Nation have before paid out, or may hereafter pay, per capita, in the Cherokee Nation, and which was, or may be, refused to or neglected to be paid to the said * * * Freedmen by the Cherokee Nation, out of any money or funds which have, or may be, paid into the Treasury of, or in any way have come or may come, into the possession of the Cherokee Nation, Indian Territory, derived from the sale, leasing or rent for grazing purposes on Cherokee lands west of 96 degrees west longitude, and which have been, or may be, appropriated and directed to be paid out per capita by the acts passed by the Cherokee council, and for all moneys, lands and rights which shall appear to be due to the said freedmen * * * under the provisions of the aforesaid articles of agreement."

The concluding paragraph of Section 3 is in these words:

> "and all judgments for any sum or sums of money which may be ordered or decreed by such court in favor of the * * * Freedmen, and against the Cherokee Nation, shall be enforced by the said court or courts against the said Cherokee Nation, by execution, mandamus, or in any other way which the said court may see fit."

Under the authority of this act the original petition was filed on September 26, 1891, in which claims on behalf of the Freedmen were asserted against the Cherokee Nation, extending to all the property of the nation, lands and funds.

Soon after the institution of that suit (Whitmire, Trustee, 30 Ct. Clms., 138; ibid. 180), the United States purchased from the Cherokee Nation that particular body of land known as the Cherokee outlet which comprised (to use the language of the jurisdictional act) "the Cherokee lands west of 96 degees west longitude," whereupon an amended petition was filed, averring the said purchase of these lands, and claiming an equal interest on the part of the Freedmen with that of Cherokees by blood, in the fund realized from the sale thereof.

Prior to the sale of these lands which form the real subject-matter mentioned in the jurisdictional act, the Cherokee Nation had leased these lands for grazing purposes and had received certain sums therefor which it had distributed among its citizens, to the exclusion of the Freedmen.

The court found in the suit referred to, that the Cherokee Nation had received and distributed $7,240,000, representing the amounts received from the leasing of said lands west of 96 degrees west longitude and the amount received from their sale to the United States and decreed that the Freedmen should be paid their proportion thereof, which it found to be $903,365. Whitmire vs. Cherokee Nation, 30 Ct. Cls. 180, 193, and the decree in that respect has been enforced.

The court further decreed that the Freedmen were entitled to participate thereafter in the common property of the Cherokee Nation in the same manner and to the same extent as Cherokee citizens of Cherokee blood or parentage might be entitled; and that in the distribution of the proceeds and avails of the public domain or common property of the Nation among the citizens thereof, by distribution per capita at any time *thereafter*, the defendant, the Cherokee Nation, and the defendant, the United States, as trustee of the Cherokee Nation,

"be enjoined and prohibited from making any discrimination between the Cherokee citizens of Cherokee blood or parentage and Cherokee citizens who are or were Freedmen who had been liberated by a voluntary act of their former owners or by law, as well as all free colored persons who were in the Cherokee country at the commencement of the rebellion and were residents therein at the date of said treaty, or who returned thereto within six months thereafter, and their descendants, to the prejudice of the latter." Ibid. 193.

The last paragraph of the decree is in these words:

"And it is further ordered, adjudged and decreed, that the defendant, the Cherokee Nation pay the costs of this suit, and that if this judgment and decree be not carried out and satisfied within six months from the date hereof, the claimant may apply to this court for such further order, relief, or remedy as the plaintiff herein may deem necessary; and that if any further proceeding be had under this decree, the rights of the attorneys and counsel for the plaintiff herein to further costs and allowances be reserved to be herein determined and fixed by the court, and the court reserves the right to make all such further orders in aid hereof as to it may seem mete." Ibid. 196.

Upon the authority of this last paragraph of the decree, presumably, the supplemental petition, which is now for consideration, was filed, and the decree entered naming certain individual persons as Cherokee Freedmen and declaring them entitled to share in the general property of the Cherokee Nation.

Our propositions are:

First, that the jurisdictional act of October 1, 1890, attempted to give the Court of Claims jurisdiction to determine two things, and only two—first, whether the Freed-

men were entitled to share in the sums realized from the leasing or sale of the Cherokee lands west of 96 degrees west longitude; and second, to define the rights of the Freedmen designated in the 9th article of the treaty of 1866, as a class of persons, in and to the common property of the Cherokee Nation.

As to the first item which the court might consider, and regarding which it might render judgment, and for which it did render judgment as hereinbefore recited, there is no doubt that the court has fully exercised its jurisdiction, the moneys having been distributed in accordance with the decree.

But as to the second item of jurisdiction, namely to define and adjudicate the rights of the Freedmen in the then common property of the Cherokee Nation (its public domain and its funds held in the Treasury of the United States), it is respectfully submitted to the court that the act did not confer the jurisdiction which the court assumed. This is said upon the authority of the cases of Muskrat vs. The United States and Brown and Gritts vs. The United States, 219 U. S. 246. These cases having been very recently decided, will be readily recalled by the court as presenting an attempt on the part of Congress to have the Court of Claims and this Honorable Court to decide whether certain acts of Congress were in violation of the Constitutional rights of the plaintiffs. This court declared in the opinion that to pass upon the question there presented would be a requirement by Congress, of the Supreme Court "to give opinions in the nature of advice concerning legislative action, a function never conferred by the Constitution, and against the exercise of which this court has steadily set its face from the beginning" (p. 362) and the opinion declared that the actions presented no justiciable controversy within the authority of the court.

At the time of the passage of the jurisdictional act in behalf of the Freedmen, October 1, 1890, the Cherokee Nation was the owner of a reservation comprising several millions of acres and of a communal fund held in trust for the Cherokees in the Treasury of the United States. None of these lands had been allotted and none of the funds distributed and when Section 2 of the act authorized the Freedmen to begin and prosecute a suit "for all moneys, lands and rights *which shall appear to be due* to the said Freedmen under the provisions of the aforesaid articles of the treaty and articles of agreement, Congress certainly did not confer upon the Court of Claims the power to determine the rights of the Freedmen in the still communal lands and funds of the Cherokee Nation. At the time of the passage of the jurisdictional act there was nothing to evidence that the distribution of the lands and funds was even in contemplation. The Cherokee Nation was a body politic maintaining its own government, with the consent and subject to the supervision of the United States, and holding its lands and funds as national lands and funds. To require the Court of Claims and this Honorable Court, to decide in advance what the rights of the Freedmen should be when, if ever, those lands and funds were distributed, was to ask of the courts an extension of judicial power against the exercise of which this court "has steadily set its face from the beginning."

But let us suppose that this act did confer jurisdiction upon the Court of Claims to decide in advance what the rights of the appellees were in the undistributed communal property of the Cherokee Nation, and further that this court would have taken the jurisdiction to declare in advance what those rights were; our position is that with the adjudication of the Court of Claims that the Freedmen designated in the 9th article of the treaty of 1866 were con-

sidered by the Court of Claims under this jurisdictional act, *as a class*; that is to say if the act conferred jurisdiction, the jurisdiction was limited to the declaration that those Freedmen who had been liberated by a voluntary act of their former owners or by law, and those free colored persons who were in the country at the commencement of the rebellion and were then residents therein, or who might return within six months, should have all the rights of native Cherokees. The act did not give the Court of Claims jurisdiction to determine who those Freedmen were; it did not authorize them to find the names of the individuals; and the Court of Claims so considered it, because, in their decree of February 3, 1896, they vested the Secretary of the Interior with authority to prepare the roll of individuals upon which the money judgment was to be distributed; and in the subsequent decisions in the case of Journeycake and others (31 Ct. Cls., 143) the court said (referring to the Secretary of the Interior):

> "He is charged by law with the duty of ascertaining their individual identity, of determining who are Delawares and who are Shawnees and of maintaining their individual rights, the question of identity of individuals entitled to the benefit of the treaty, being in its nature political, and within the Secretary's official jurisdiction, the court would adopt his determination if the complainants were to be named individually in the decree."

Accordingly, when the Commissioners appointed by the Secretary of the Interior applied to the Court of Claims for instructions as to the enrollment of an individual Freedman, the court announced that it was of the opinion that the Act of March 2, 1895 (28 Stat., 910), prescribed the manner in which payments per capita shall be made and that

the matter of payment is exclusively within the jurisdiction of the Secretary of the Interior.

In the opinion (Record, 225) reference is made to the statement at the foot of the final decree—"and the court reserves the right to make all such further orders in aid hereof as to it may seem meet," and this is taken by the court in its present opinion as continuing its jurisdiction for the purpose of the present decree; but when the preceding words in the last paragraph of this decree are read (30 Ct. Cls., 196) it will appear that this had reference to the distribution of the $903,365 which the court had adjudged to the Freedmen as being their proportion of the fund realized from the leasing and sale of the lands west of the 96th degree west longitude. That paragraph (cited hereinbefore) decrees that if the judgment of the court be not satisfied within six months from date, the claimant might apply to the court for such further order, relief or remedy as he might deem necessary; evidently having reference only to the authority in the jurisdictional act expressed in these words:

> "And all judgments for any sum or sums of money which may be ordered or decreed by such court in favor of the * * * Freedmen and against the Cherokee Nation, shall be enforced by the said court or courts against the said Cherokee Nation by execution, mandamus or in any other way which the said court may see fit."

Inasmuch as the judgment of the court decreeing the payment of moneys was applicable only to funds which had been already received and distributed by the Cherokee Nation, this language of the jurisdictional act just cited, giving the court the power to execute its decree, manifestly applied only to the payment of the $903,365. By no possi-

bility could it apply to a judgment that the Freedmen were entitled to share in the communal lands and funds of the Cherokee Nation, because in the first place it was not a money judgment and in the second place there was no subject-matter to which an execution, mandamus or injunction might apply. The lands were still communal, the fund was still national. No effort had been made to allot the one or distribute the other, and so far as the legislation shows, none was in contemplation. The whole effect of the judgment of the court respecting the rights of the Freedmen as to the communal lands and funds was to declare that when hereafter, if ever, the lands were divided, or the fund distributed, those Freedmen designated in the ninth article of the Treaty of 1866 should share. As to this item, the court was given no power to enforce its decree. It could not enforce it by execution, because there was nothing upon which an execution could be levied. It could not enforce it by mandamus or by injunction, because there was no attempt and no suggestion of an attempt at the time to exclude the Freedmen from participation in those lands and funds.

It is to be noted that this provision does not authorize the issuance of any process, ordinary or extraordinary, against any officer of the United States.

Accordingly we insist that if the Court of Claims had the power to decree the rights of the Freedmen in the lands and funds of the Cherokee Nation to be distributed in the coming years, it exhausted its jurisdiction when it adjudged that those Freedmen designated by the 9th article of the treaty of 1866 were as a class entitled to share, and charged the Secretary of the Interior with the duty of ascertaining and identifying them.

THE APPELLEES WERE GUILTY OF LACHES IN NOT HAVING TAKEN EARLIER ACTION TO SECURE THEIR ALLEGED RIGHTS.

It would seem to go without saying that if the appellees in this case had any right to enrollment and were denied that right, they could have made application for a writ of mandamus in the Supreme Court of the District of Columbia to compel the Secretary of the Interior to enroll them together with other Cherokee Freedmen.

Such action could have been taken, and ought to have been taken when the Secretary of the Interior on May 11, 1900, issued instructions to the Dawes Commission to disregard the Kern-Clifton Roll in proceeding under the Act of June 28, 1898 (Record, p. 70-72).

In Kimberlin's Case (104 Federal Reporter, 716), which was decided October 5, 1900, it was held that the Dawes Commission had exclusive jurisdiction to make the rolls and that the court was without jurisdiction to review their acts.

Again in July, 1902, when the general allotment act was passed, which was the subject of consideration by this Honorable Court in the case of Brown vs. Gritts, cited herein, Congress provided the method of allotment and declared who should be entitled to be enrolled for the purpose of sharing in the lands and funds; an opportunity was given then to the appellees to assert their rights, since they were not within the contemplation of the act.

During the consideration of the various cases cited on Rec., pp. 108-192, another opportunity was given to these appellees to assert their alleged rights; and finally, when the act of April 26, 1906, was passed it fixed a positive date for the closing of the rolls, and these appellees who had not been enrolled could have asserted whatever rights they may have in and to the lands and funds.

The appellees did none of these things, but permitted Congress to pass act after act, giving to the executive branch of the Government the authority to make the Cherokee rolls, distribute their funds, and allot their lands. They knew, or ought to have known, that 4,924 Cherokee Freedmen had been enrolled by the Dawes Commission and that they were not among that number, yet they did nothing until the filing of the supplemental petition in this case on September 30, 1907, long after the rolls were closed.

It is respectfully submitted that they can occupy no superior position to that of the Pottawatomies represented by Pam-to-pee (148 U. S., 691), who permitted the fund due the tribe to be distributed, and then attempted to assert their claims to the fund.

It is submitted that in view of this long inaction upon the part of the appellees they ought not to have any standing, now the question has been decided.

The appellants, the United States, have presented in their brief the propositions that the Court of Claims has no power to issue a writ of injunction as respects the alleged rights of these Freedmen. We desire to join in that contention, alleging as hereinbefore suggested that the power to grant extraordinary process is limited to the money judgment which the Court of Claims was authorized to award under the original act.

It is also presented by the United States that Congress conferred upon the Secretary of the Interior exclusive jurisdiction to make the Cherokee rolls. That is a position also which the appellants herein represented desire to take.

It is, however, so fully argued in the brief for the United States that an argument here would be a mere repetition.

CHARLES M. RICE,
Attorney.

IN THE

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THE CHEROKEE NATION AND THE UNITED STATES,
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MOSES WHITMIRE, TRUSTEE FOR THE FREEDMEN OF THE CHEROKEE NATION.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF

ON BEHALF OF THE KEETOOWAH SOCIETY, A CORPORATION, RICHARD M. WOLFE, PRESIDENT, PRICE COCHRAN, BILL MANKILLER, GEORGE DUCK, THOMPSON HUMMINGBIRD, JACKSON REDBIRD, GEORGE REDBIRD, GEORGE GREECE, ROBERT MEIGS, WILLIAM COCHRAN, WATT CHRISTIE, ROBERT CARRETT, MIKE CAREY, JACK HAWKINS, ALEX HAWKINS, WILLIAM WOODALL, BOONE MEIGS, JOHN M. SANDERS, LEVI TUCKER, FRANK J. BOUDINOT, ISAAC GREECE AND LEVI B.

GRITTS; THE REPUBLICAN KEETOOWAH SOCIETY, JOHN MCINTOSH, HEAD CAPTAIN, THOMAS TUCKER, CANDY MINK, JOE FOX, ALLISON MANUS, A MINOR; GENIE GRITTS, A MINOR; JOE HILDEBRAND, E. T. WOLFE AND E. C. GREECE; AND THOUSANDS OF OTHERS, CHEROKEES BY BLOOD.

STATEMENT.

The Keetoowah Society, on behalf of the members of which this brief is, by leave of Court, filed, is an organization established in the year 1859, incorporated in the year 1905 under the laws of the United States, having a membership consisting exclusively of Cherokees by blood, and having its principal office at Tahlequah, Oklahoma, formerly the capital of the Cherokee Nation.

The purposes and objects for which the Society was formed, and for which it exists, are to protect the rights and interests of Cherokees by blood in their common lands and funds, and to protect the personal liberties and individual property rights and interests of its members and of all other Cherokees by blood having like interests with them.

The history of the litigation of this case is, in the main, fully set forth in the briefs herein filed on behalf of the Freedmen and of the United States; and the special purpose of this brief is to show that the Cherokees by blood, by and through the above named Keetoowah Society and its officers and leading members, have at all times protested against the rights claimed by and for the Cherokee Freedmen to share in the final distribution in severalty of the lands and principals of the vested funds, tribal property of the Cherokee people, owned by the Cherokees as members of the community, the original Cherokee Tribe, parties to the treaty of May 6, 1828 (7 St., 311), and their descendants.

The Cherokees by blood on whose behalf this brief is filed did not have such individual interest in the lands and funds now before this Court, as to permit them to be parties to the suit in 1896.

At this time, however, each has an individual estate of inheritance in said lands and funds, and is therefore interested in this suit as an individual.

It is their purpose in this brief now to protest again that the only rights ever acquired by Cherokee Freedmen in Cherokee property were the rights bestowed upon the Freedmen under the treaty of July 19, 1866 (14 Stat., 799), which rights were limited to those possessed by other *members of the Cherokee Nation,* as citizens thereof, which did not extend to right of soil or interest in the vested funds of the Cherokees.

SUBJECT MATTER OF SUIT.

The subject matter of the suit in 1896 was a particular fund amounting to $7,240,000, which had been wrongfully paid out per capita by the Cherokee National Council to certain members of the Nation of Cherokee blood to the exclusion of the Freedmen of the Nation. The subject matter was limited solely to this fund.

The lands and principals of the vested funds belonging to the Cherokees were not then subject to distribution in severalty. The lands and funds which are now being divided and distributed among the Cherokees were not, and could not have been, considered a part of the subject matter at that time.

ERRORS OF THE COURT.

So far as concerns those on whose behalf this brief is submitted, the principal error complained of is that the decree of the Court of February 20, 1911, should have de-

clared what were the just rights in law or equity, if any, of the freedmen under Article 9 of the treaty of 1866 in the lands and vested funds of the Cherokees, for the first time made payable per capita by the provisions of the act of July 1, 1902, independently of any interest in, or control over, the same that the Cherokee National Government may have had or exercised prior to the time provided for allotment and distribution of the said property under the act of July 1, 1902; and especially that the said decree did not declare that said lands and vested funds were, and are, owned by those persons enrolled, or to be enrolled, under and by virtue of the terms of the act of July 1, 1902, exclusively of all freedmen or free colored persons.

Ownership of the lands and vested funds communal, not national; in the people, not in the Government—not affected by citizenship in the nation.

The common, or communal, property of the Cherokees at the time of the adoption of the constitution in 1839 consisted of:

First. The seven million acres of land described in the second article of the treaty of 1828 (7 Stat., 311) and in the first article of the treaty of February 14, 1833 (7 Stat., 414), known as the "Home Tract" or "Cherokee Reservation."

Second. The free and unmolested use of the country known as the "Cherokee Outlet," lying immediately west of the seven million acres.

Third. Certain funds in the Treasury of the United States.

This property possessed no national characteristics at that time, was owned by the tribe as a community, was subject to sale or other disposition only by the tribal au-

thorities, to wit, the Chiefs and Headmen of the Tribe, who in disposing of the property acted solely as the agents or representatives of the communal owners, to wit, the members of the tribe.

The Cherokee Constitution was adopted in 1839, Article 1 of which, after having by Section 1 described the Cherokee domain and identified it as the land described in the treaty of 1833, which comprises the property in controversy in this Court, delegates to the Cherokee National Council the power to control the use of the lands of the Nation, and provides by Section 2:

> "The lands of the Cherokee Nation shall remain common property; but the improvements made thereon and in the possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of them."
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> * * * * * * * * *
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> "Moreover, the National Council shall have power to adopt such laws and regulations, as its wisdom may deem expedient and proper, to prevent citizens from monopolizing improvements with the view of speculation."
>
> Cherokee Constitution, Art. 1, Sec. 2.

Thus, after defining in Section 1 the territorial boundary of the country to be occupied by the Cherokee Nation, that is, the body politic, the Constitution declares that the lands within that boundary shall remain common property; that is, that they shall remain as they were before the body politic was organized, which means that they should remain the community property of the Cherokee Tribe.

At the time of the adoption of the Constitution in 1839 the membership of the Cherokee Tribe was the same as the membership of the Cherokee Nation. In the course of

time certain persons became associated with the tribe through intermarriage, etc., and enjoyed the rights of citizenship, but they were forbidden by the Constitution from participating in the ownership of the tribal, or communal, property, and when the Constitution of 1866 was adopted, in order that there might be no question about the constitutional provision of 1839 confining the communal property to the members of the Cherokee Tribe, this provision was readopted.

Therefore, those persons who had thus become associated with the tribe were again expressly prohibited from participating in the ownership of the tribal property thereof, and all persons were again put on notice that citizenship in the Cherokee Nation did not confer the right to participate in the ownership of the tribal property.

The Cherokee people, having dedicated to the Cherokee National Government the right to occupy and use the Cherokee domain, nevertheless did not delegate to that government the power to add a single member, by adoption or otherwise, to the tribe, and from 1839 to 1866 no person by act of the National Council or otherwise could be so added to the tribe.

This being so, no matter what powers the Cherokee National Council possessed in regard to the admission of persons to become citizens of the Cherokee Nation as a body politic, it had no power whatever to admit any person to become a member of the tribe with any of the rights of ownership in communal property possessed by members of the tribe alone.

This is clearly shown by the decision of this Court in the Intermarriage Cases, 203 U. S., 76, where, after discussing the rights conferred upon citizens by the very sections of the Constitution under which the Freedmen claim, the Court, at page 86, *infra*, held that they acquired civil and political rights only.

The National Government exercised the dual function in the Cherokee Nation:

First. Of administering the National affairs for all the people of the Nation, such as the enactment of laws, the construction of highways, the maintenance of schools, the enforcement of police regulations, the collection of revenues, etc., and,

Second, it assumed the management of the communal property of the communal owners residing in the Nation. In this latter capacity it acted as the agency for the communal owners in the protection and control of this property. This control by the National Council was not delegated to it directly by the owners, but was assumed by it and acquiesced in by the owners as a proper agency for the management and preservation thereof under its power to prevent monopoly of improvements. (Article 1, Sec. 2, Cherokee Constitution.)

The National Council had no authority, either inherently or by delegation, to dispose of the corpus of this estate, or to convert it to national purposes. The proceeds derived from the leasing of lands and the interest on the vested funds could be used for national purposes; but here the control of the communal property by the National Council ceased.

THE ORIGINAL WHITMIRE DECISION AND DECREE ARE WITHOUT FOUNDATION IN LAW.

The judgment of the Court of Claims in the original Whitmire case was based upon a wholly erroneous understanding of the Constitution of the Cherokee Nation.

The Court decided properly that the treaty of 1866 did not confer on the Freedmen any property rights whatsoever, but held that the amendment to the Cherokee Constitution made in 1866, after the execution of the treaty

and for the purpose of carrying out its provisions, did confer upon the Freedmen the same property rights as the Cherokees themselves enjoyed. That decision was rendered March 4, 1895.

Subsequently the Intermarried Whites based their claim to property rights on the same provision of the Constitution of 1866, and this Court, in its decision filed November 5, 1906, declared that said Amendment to the Constitution related solely to political rights and conferred no property rights on any one. Clearly, therefore, the opinion of the Court of Claims in the Whitmire case was founded upon error and the basis of its decision has been completely taken from under it. The Court of Claims, discussing the treaty of 1866, declared:

> "The United States did not, it may be conceded, stipulate for more than that the Freedmen should become citizens 'with all the rights,' that is, political rights, 'of native Cherokees,' and that 'all laws of the Cherokee Nation shall be uniform throughout said nation,' and that the President of the United States should have the power to secure to the Freedmen 'a fair and equitable application and expenditure of the national funds'; but the constitution of the Cherokee Nation then came into the case and defined what citizenship was, and in express terms ranked 'Freedmen' with 'native-born Cherokees,' and the lands of the nation as 'common property.' If those lands had remained common property, unsold, and held for governmental purposes, it seems incontrovertible that all classes of citizens, Cherokees by blood and Cherokees by adoption, would have been, as citizens, equally and mutually entitled to the national benefits which might be derived from them" (30 Ct. Cl. at p. 157).

This formed the basis of the Court's judgment and decree.

This Court, speaking with reference to the same amendment of the Cherokee Constitution, quoted it as follows:

"Sec. 5. No person shall be eligible to a seat in the National Council but a male citizen of the Cherokee Nation, who shall have attained the age of twenty-five years and who shall have been a bona fide resident of the district in which he may be elected at least six months immediately preceding such election. All native-born Cherokees, all Indians and whites legally members of the Nation by adoption, and all Freedmen who have been liberated by voluntary act of their former owners, or by law, as well as free colored persons who were in the country at the commencement of the rebellion and are residents therein, or who may return within six months from the nineteenth day of July, 1866, and their descendants who reside within the limits of the Cherokee Nation, shall be taken and deemed to be citizens of the Cherokee Nation."

And the Court, by Chief Justice Fuller, declared:

"We cannot accept the view that this amendment amounted to a grant of property rights, or operated to enlarge the authority of the National Council in respect of the readmission of former members of the Nation."

"The amendment (found in that part of the Constitution in respect to officers and elections) must be taken as a whole, and related to eligibility to a seat in the National Council and not to property rights. The contention that the words 'citizens of the Cherokee Nation' should be construed as relating to the constitutional provision of 1839 that the lands of the Nation should be common property, is without merit in view of the provisions themselves."

(Cherokee Intermarriage Cases, 203 U. S., 85-6.)

It is well known as an historical fact that the amendments of the Cherokee Constitution, adopted in 1866 immediately following the execution of the treaty, were adopted solely for the purpose of giving sanction by the Cherokees themselves to the new provisions of the treaty of 1866 relating to Freedmen and others.

It can hardly be supposed that if the Cherokees failed to grant property rights to the Freedmen when negotiating with the authorities of the United States in 1866, they would immediately thereafter, of their own will, free from the influence of the United States, give to the Freedmen property rights which had not been given by the treaty. If the rights of the Freedmen were to be in any way altered, the presumption would be that they would be diminished by the Cherokees, and not enlarged.

As a matter of fact, the Cherokees simply embodied in their Constitution the rights which had been conferred upon the Freedmen by the treaty of 1866, and they conferred upon them no other rights.

Certain rights of Cherokees by blood, as shown herein, were not passed upon, or disposed of, by the Court of Claims in 1896, for the reason that the issues involving those rights, between the Cherokees by blood and the Cherokee freedmen, could not then be raised.

It was the duty, however, of the United States, as trustee for the Cherokees, when the supplemental petition of 1907 was filed in the Court of Claims, to present those issues, and the decree of the Court rendered in the case was, and will remain, incomplete until the rights of Cherokees by blood, as against the claims of the freedmen to a right to participate in the final distribution of the lands and the vested funds of the Cherokees, have been properly adjudicated.

The subject matter now involved in the suit, and with relation to which this brief is filed, came into existence after the decree of 1896, but prior to the filing of the Supplemental Petition by the Substitute Trustee in 1907.

The purpose of the supplemental bill, briefly stated, was to determine the rights of Cherokee Freedmen and their

descendants, not solely the rights of the persons enrolled on the Kern-Clifton roll, to participate in the final allotment of Cherokee lands and distribution of Cherokee tribal funds.

Such rights, therefore, as the Cherokees by blood had in this property independently of, and distinct from, the rights of the citizens of the Cherokee Nation, or the rights of the Cherokee Nation as a body politic, should have been presented and urged by the United States, and should have been protected by the decree of the Court, but those rights have never been considered by the Court, and the Cherokees by blood have not been permitted to intervene in the case and defend their rights.

When the decree of 1896 was rendered the only justiciable matter in the suit was the right of the Freedmen to a pro rata share of a large sum of money that had been paid and distributed by the Cherokee National Council to a certain class of citizens of the Cherokee Nation, their proportionate part of which the Freedmen contended should have been distributed in like manner to them.

At that time, therefore, the controversy, and the only controversy, was one between the Cherokee Freedmen and the Cherokee National Government. No issue was raised as to the rights of Freedmen to participate in the final distribution of the lands or vested funds of the Cherokees, over which the Cherokee National Government never had any legitimate control, but only the right to have their equal pro rata share of any distribution of National moneys or property that might be made under the authority and direction of the Cherokee National Council to citizens of the Cherokee Nation.

Speaking of this very property, Chief Justice Nott, in his opinion in the Whitmire case (30 C. Cl. at page 158) says:

"It is possible that there still exists or hereafter may be revived a species of property which is an exception to the previously expressed conclusions of the Court. To prevent future misapprehension and complication this will now be noted." * * * And at p. 159: "Payment per capita" (that is, the right to per capita shares in severalty of land or funds) "must be regarded as the badge or recognition of an individual communal interest as distinguished from a governmental or national ownership. Such funds are not 'common property' within the intent of the Cherokee Constitution, but trust estates in the custody of the United States for the benefit of designated individuals or communities. Over them the Cherokee Government has no legitimate control, and in them the freedmen have no estate or interest."

CHEROKEE NATIONAL GOVERNMENT POWERLESS.

The Cherokee National Council had no authority to pay or distribute to citizens of the Cherokee Nation any part of the tribal or communal property which belonged to the Cherokees as a community. In other words, the Cherokee National Council never had authority to dispose of the lands or vested funds of the Cherokees.

We respectfully deny that the Court of Claims had power under the original jurisdictional act to enter a decree fifteen years ago which would control the future disposition of the lands now in controversy, which lands were not mentioned in that case, which were not then allottable or divisible, and as to the allotment or division of which no act of Congress had been passed and none had been even suggested.

Even if such power then existed in the Court, it must be clear that persons not then parties to the case should not be bound by it in view of the statutes passed and the decisions

rendered in kindred cases and in view of the facts developed since the decision was filed in the original Whitmire case.

The wrong and injustice in the original opinion and decree are manifest, because:

1. The opinion and decree in that case related solely to the share of the claimants in certain funds previouly ordered to be distributed by the Cherokee National Council without authority of law. The whole case rested on the fact that there had been a wrongful conversion of funds and an illegal distribution of the same to some of the citizens of the Cherokee Nation.

2. The title to the lands now being allotted, known as the "Home Tract," is not, and never was, in the Cherokee National Government, but was lodged in the Cherokees, and the Cherokees were not parties to the original Whitmire case.

3. The finding of the Court of Claims in the original Whitmire case that the amendment to the Cherokee Constitution made in 1866 conferred full property rights has been overruled by this Court in the Cherokee Intermarriage cases, holding that said amendments conferred no property rights whatsoever.

4. The consent decree filed in the Whitmire case can relate only to the funds directly involved in that case at that time, and cannot be binding as to lands not then involved in the controversy, held by a different title and by persons not parties to the suit. (Muskrat, *et al.*, vs. U. S., 216 U. S., p. 346.)

5. The Cherokee Chief and the Cherokee National Government never had any right in, or power of disposition of, Cherokee lands, and their consent to the amended decree of February 3, 1896, in the original Whitmire case, could not have been intended to affect in any manner the future dis-

position of Cherokee lands, which were not then involved in the controversy, and if their consent to such decree was intended to affect the disposition of such lands, such consent would be void and of no effect.

6. The United States did not join in signing the consent decree.

CONCLUSION.

The Act of July 1, 1902, which provides for enrollment of persons entitled to allotment in the Cherokee Nation, nowhere makes provision for the enrollment of the Cherokee Freedmen except by reference to Section 21 of the Curtis Act of June 28, 1898 (30 St., 495). Therefore the Freedmen must look to the Curtis act for their right to enrollment. This act provides in Section 21, for the enrollment of Freedmen in strict compliance with the decree of the Court of Claims of February 3, 1896. This decree provides that the Freedmen shall be enrolled for participation in the distribution of national property only.

Therefore, in order to entitle the Freedmen to participate in the lands and vested funds of the Cherokees, the subject matter of the present proceedings, such lands and funds must first have been converted into national property.

There is no evidence in this record to show that such conversion has ever been made, and in fact it is not claimed that such has been done. It is a manifest impossibility for this to have been done, as the National Government was practically abolished by the Curtis Act of June 28, 1898 (30 St., 495), the officers of which government were prohibited from receiving or disbursing Cherokee funds.

The leasing of the lands, etc., from which the principal revenue of the Nation was derived, was transferred from the Cherokee Government to the Secretary of the Interior by Sections 13, 16 and 23, and the funds directed to be

deposited in the United States Treasury to the credit of the tribe by Section 16. It was further provided by said Act in Section 26

> "That on and after the passage of this act, the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the Courts of the United States in the Indian Territory."

That the lands and vested funds remained unconverted up to the date of the passage of the Act of July 1, 1902, is not disputed. Therefore the National Government, having prior to the Act of July 1, 1902, been rendered incapable of again converting any lands or vested funds of the Cherokees into National property, and the United States having accepted the trust under the Act of July 1, 1902, of allotting these lands and distributing these funds to the rightful owners, it is manifestly impossible for any such conversion and pro rata distribution to have been made of this property, by the Cherokee National Government, as was made of the funds dealt with by the Court of Claims, and as was contemplated by its former decree.

For the foregoing reasons we respectfully submit that the decree of February 20, 1911, should be reversed.

C. C. CALHOUN,
FRANK J. BOUDINOT,
JOHN J. HEMPHILL,
DANIEL B. HENDERSON,
Amici Curiae.

CHEROKEE NATION AND UNITED STATES *v.* WHITMIRE, TRUSTEE FOR FREEDMEN OF THE CHEROKEE NATION.

APPEAL FROM THE COURT OF CLAIMS.

No. 735. Argued January 9, 10, 1912.—Decided January 29, 1912.

As after a decree of the Court of Claims in favor of the petitioner an act of Congress was passed, and the court made another decree granting the same relief, the second decree was a decision upon the effect of the subsequent legislation, and an appeal lies therefrom if taken within the time prescribed by law.

Held, that under the circumstances of this case, and the proceedings taken thereon, appellants' appeal was taken in time.

Lowe v. *Fisher*, *ante*, p. 95, followed as to the construction of the Cherokee Treaty of August 11, 1866, and as to the freedmen of the Cherokees and their descendants entitled to be enrolled as citizens and the power of Congress thereover, and that the Secretary of the Interior had the power, after notice and opportunity to be heard, to strike from the rolls names which had been improperly placed thereon through mistake or fraud.

44 Ct. Cl. 453, reversed.

THE facts, which involve the construction of the various treaties, acts of Congress and decisions of the Court of Claims in regard to the rights of Cherokee freedmen and their descendants to share in the distribution of tribal property, are stated in the opinion.

Mr. William W. Hastings for appellant, the Cherokee Nation.

Mr. Assistant Attorney General John Q. Thompson and *Mr. George M. Anderson*, filed a brief for appellant, the United States.

Mr. Samuel A. Putman and *Mr. Charles Poe*, with whom *Mr. Robert H. Kern* was on the brief, for appellee.

Mr. Charles M. Rice, Mr. George S. Ramsey and *Mr. C. C. Calhoun, Mr. Frank J. Boudinot, Mr. John J. Hemphill* and *Mr. Daniel B. Henderson,* filed briefs as *amici curiæ.*

MR. JUSTICE MCKENNA delivered the opinion of the court.

This appeal is prosecuted to review a supplemental decree of the Court of Claims enjoining and directing the Secretary of the Interior to enroll upon the final roll of the citizens of the Cherokee Nation for allotment of lands the names of certain persons and their descendants claiming rights as Cherokee freedmen, whose names were found upon the roll called the Kern-Clifton roll, which the decree adjudged was directed to be made by a former decree of the court. The names of those persons, who are appellees in this case, after investigation by the Secretary of the Interior, were found by him not entitled to be enrolled, and not entitled to participate in the distribution of tribal property.

The decision in *United States ex rel. Lowe* v. *Fisher, ante,* p. 95, has simplified the decision in this case. Indeed, the ultimate question in both is the same, the power of Congress over the allotment of Indian lands and the manner of ascertaining what persons shall be entitled to them. There were, however, contentions made in that case which are not made here. There are propositions of law conceded in this case which were contested in that. Therefore a brief summary of the elements necessary to a decision is appropriate.

Preceding the merits, however, motion to dismiss the appeal must be disposed of. The motion is made on the following grounds: (1) The decree of February 3, 1896, was a final decree from which no appeal was prosecuted to this court; (2) that the decree of February 20, 1911, hereafter referred to, was merely in the nature of an execution

of that of February 3, 1896, and defined no new rights, but enforced merely rights established and consented to; and (3) because, although the decree of February 20, 1911, was regularly entered on that day, the appeal now pending was not allowed or prosecuted until the seventeenth of June, 1911, more than ninety days after the entry of the decree.

The first and second grounds are untenable. The decree under review has broader application than that of February 3, 1896. It determined rights to allotments which had not then been provided for, and, assuming that it declared the principle by which such rights could be determined, there was, as we shall presently see, intervening legislation by Congress. This legislation gave rise to serious controversy. It confirmed, it was contended by petitioners (appellees here), and is yet contended by them, as we shall presently see, the decree of the court both as to the principle of the decree and also as to the means of identification of the individuals who would be entitled to rights under the principle. By the defendants (appellants here) it was contended that the legislation superseded the decree and made new provision for the identification of persons. The court decided in favor of the petitioners, and we think the decision is more than the execution of the decree of February 3, 1896. It is a decision upon the effect of subsequent legislation by Congress enacted in the exercise of its power over Indian affairs, a power which is not questioned.

The third ground urged for the dismissal of the appeal is also without merit. The contention is that the decree of the court became final the instant it was entered, February 20, 1911, and that an appeal was not taken from it until June 17, 1911, which was not within the time allowed by § 1069 of the Revised Statutes. There were, however, intervening proceedings. The record shows that "on March 30, 1911, the defendants [appellants] filed an application for appeal. On May 15, 1911, the defendants

filed a motion to withdraw the application for appeal filed March 30, 1911, which was allowed by the court May 15, 1911." On May 15, 1911, the defendants filed a motion for new trial, which motion was overruled June 5, 1911, "with privilege to the defendants to renew their application for appeal heretofore filed." The record further shows that the defendants, "from the decree rendered on the twentieth day of February, 1911, in favor of claimants, . . . make application for, and give notice of, an appeal to the Supreme Court of the United States." The application was allowed as prayed.

This court has decided that if a motion for new trial or petition for rehearing is made in season and entertained by the court, the time for taking an appeal or writ of error does not begin to run until the motion or petition is disposed of. *Kingman* v. *Western Manufacturing Co.*, 170 U. S. 675. It is, however, urged that the court lost jurisdiction of the case by the application for appeal filed March 30, 1911. *United States* v. *Adams*, 6 Wall. 101, is cited to support this contention. In that case the paper filed was as follows: "The United States, by E. P. Norton, its solicitor, makes application to the Honorable Court of Claims for an appeal of the case of *Theodore Adams* v. *The United States* to the Supreme Court of the United States." This application was filed within the ninety days allowed by the statute. The order allowing it, however, was not made until after the expiration of the ninety days. It was contended that both application and allowance should have been made within that time, but this court held otherwise, saying (p. 109) "that the filing of this paper was taking the appeal, and that the delay in the subsequent proceeding to render it effectual does not touch its validity."

It was not, however, decided that the Court of Claims lost control of the case. It was only decided that the party had secured a right under the statute. The rules of the

Court of Claims, made under regulations prescribed by this court, provided for further action to perfect the right acquired by the party which was made necessary by certain statutes under which only questions of law could be brought here for review. And the action was more than formal. It consisted in the finding of the ultimate facts in the nature of a special verdict and the questions of law therefrom to be certified to this court.

The practice in the Court of Claims is adverse to appellees' contention. The court followed the practice in entering the decree of February 3, 1896, the decree upon which appellees based all of their rights. It was substituted for a decree passed May 8, 1895. On the twentieth of July, following entry of the latter decree, the defendants filed a motion for rehearing and an application for appeal from the decree. A few days afterward the claimants also filed an application for an appeal. Later the defendants filed a motion for new trial. On January 30, 1896, the applications for appeal were withdrawn by leave of the court, and, on February 3, the decree of May 6, 1895, was vacated and the decree of the former date was entered.

It will be observed, therefore, that if the contention of appellees is correct that the Court of Claims lost jurisdiction of the decree under review by the application of appellants for an appeal March 30, 1911, the court lost jurisdiction of the case by the applications for appeal from the decree of May 8, 1895, and therefore had no jurisdiction to enter the decree of February 3, 1896, which is the foundation of the rights of appellees. Counsel would hardly like us to push their contention that far, and that far it might have to be pushed if it were tenable. The motion to dismiss is denied.

The Court of Claims obtained its jurisdiction of the questions involved by an act of Congress approved October 1, 1890, 26 Stat. 636, c. 1249, entitled "An Act to

refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes." The rights referred to the Court of Claims for adjudication were those "in law or in equity . . . of the Cherokee freedmen" who were "settled and located in the Cherokee Nation under the provisions and stipulations of article nine" of the treaty of 1866 "in respect to the subject matter" in the act provided for. The subject-matter was described to be "to recover from the Cherokee Nation all moneys due either in law or equity and unpaid to the . . . freedmen, which the Cherokee Nation" had "before paid out, or" might thereafter "pay per capita, in the Cherokee Nation, and which was or may be" refused or neglected "to be paid to the said . . . freedmen by the Cherokee Nation, out of any money or funds" which had been, or might be, "paid into the treasury of," or in any way had come or might come "into the possession of the Cherokee Nation, Indian Territory, derived from the sale, leasing, or rent for grazing purposes on Cherokee lands west of ninety-six degrees west longitude," and which had been or might be, "appropriated and directed to be paid out per capita by the acts passed by the Cherokee council, and for all moneys, lands and rights which" should "appear to be due to the said . . . freedmen under the provisions of the aforesaid articles of the treaty and articles of agreement." 26 Stat. 636.

Article IX of the treaty of August 11, 1866, 14 Stat. 799, 801, the meaning of which was to be determined, provided as follows: "They [Cherokee Nation] further agree that all freedmen who have been liberated by the voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees."

Under the jurisdictional act, and in accordance with its provisions, suit was brought by the freedmen by their trustee, Moses Whitmire, against the Cherokee Nation and the United States to determine the rights of the freedmen under the treaty, which resulted in a decree of the court passed May 8, 1895. The course of the litigation will be found in 30 Ct. Cls. Reps. 138, 180, respectively.

The court decided that under the Cherokee constitution of 1866 the freedmen became citizens of the nation equally with the Cherokees and equally interested in the common property and equally entitled to share in its proceeds, but also decided that the freedmen to whom the treaty referred were those who had returned to the nation within six months after the promulgation of the treaty, and their descendants, and that the freedmen and the descendants of freedmen who did not return within six months were excluded from the benefits of the treaty. *United States ex rel. Lowe* v. *Fisher, ante*, p. 95.

The court decreed that the Cherokee Nation and the United States be prohibited from making any discrimination between such freedmen citizens and their descendants and native Cherokees in the distribution of a fund of $8,595,736 paid by the United States to the Cherokee Nation for that portion of its territory known as the "Cherokee Outlet."

The court conceived it necessary to ascertain the individual Indians who were entitled under its decree to share in the fund, and adjudged that the roll called the "Wallace Roll," which showed 3,524 persons, should be approved by the court.

Appeals were prayed by claimant and defendant, but were withdrawn afterward by stipulation, and a decree was entered February 3, 1896, as of May 8, 1895. The decree adjudged the rights of freedmen to be as we have hereinabove set out.

The decree also authorized the Secretary of the Interior

to appoint commissioners to make up a roll of the freedmen entitled to share in the fund to be distributed, which that officer did. They completed the roll which was thereafter known, and to which we have referred, as the Kern-Clifton roll. It was approved by the Secretary on the eighteenth of January, 1897, and in the succeeding month the moneys available for distribution were paid to the persons whose names were on the roll.

The legislation in regard to the allotment of lands and the making of rolls of persons entitled to allotments is detailed in *United States ex rel. Lowe* v. *Fisher*, and need not be repeated except in a very brief way. By virtue of that legislation the Dawes Commission, which had been created before the decree of February 3, 1896, proceeded to make up rolls, which were finally approved by the Secretary on March 4, 1907, from which were excluded a large number of freedmen whose names were on the Kern-Clifton roll, with the consequence that such persons so excluded will receive no allotments of lands or share in the moneys which stand to the credit of the Cherokee Nation in the Treasury of the United States.

On May 6, 1908, Jacob B. Wilson, by permission of the Court of Claims, and having been substituted trustee of the freedmen, filed a supplemental petition in the court in behalf of such excluded persons, which recited the decrees of the court and acts of Congress subsequent to them, asserted a right under the decrees and acts of Congress to be upon the rolls, to be allotted lands and to share in the distribution of funds, and prayed that the action of the Dawes Commission and of the Secretary of the Interior be declared unlawful, and that the Cherokee Nation and the United States be enjoined from discriminating between such freedmen and other citizens of the Cherokee Nation in the allotment of lands and the distribution of property and assets of the nation, and that it and the United States be further enjoined from further

disturbing such freedmen in the possession and occupation of their homes and improvements, and to reinstate such of them as have been ousted from such possession.

The court took jurisdiction of the petition, as we have seen, and decreed as it prayed. 44 Ct. Cls. 453. The court, in an elaborate and ably reasoned opinion, decided that its decree had larger scope than a description of the class of freedmen and the declaration of a principle, and that it undertook to identify "the individuals who were entitled to share in everything that was to be allotted or distributed." To this, the court said, the "defendants made no objections and acquiesced in the terms of the decree for the distribution of that part of the property then ready to be distributed." The court further said that "there was nothing in the terms of the decree or in the conduct of the parties affected by it to raise the inference that its language did not apply to all future distributions of the property, which the plaintiffs in that suit were entitled to have and enjoy whenever such property was ready for distribution."

The court, therefore, considered that the Kern-Clifton roll was made in compliance with the decree, and that the provisions of the Curtis Act, June 28, 1898, 30 Stat. 495, c. 517, requiring a roll to be made in "strict compliance with the decree of the Court of Claims rendered the third of February, eighteen hundred and ninety-six," necessarily confirmed the Kern-Clifton roll, and that the Dawes Commission, in disregarding it, disobeyed the command of the statute. "If," said the court, "the payment by the Secretary of the Interior was a 'compliance' with the provision of the decree for the payment of money, the refusal of the Dawes Commission to allow those same persons to participate in the common property, as further provided in the decree, is not a 'strict' compliance, nor, for that matter, a compliance of any kind."

The case is simplified by the concession of appellees that

the Congress had power to alter the decree and to adopt other means or ways for the disposition of the property than there provided. Indeed, the decree of the court recognizes this power and the case is brought to an interpretation of the acts of Congress subsequent to the decree. As we have already said, we have reviewed those acts in *United States ex rel. Lowe* v. *Fisher*, and, after a further consideration of them invoked in the case at bar and supported by the very able opinion of the Court of Claims, we adhere to the views there expressed. Congress accepted the decree as a correct interpretation of Art. IX of the treaty as to the rights of freedmen. It did not accept the Kern-Clifton roll as an authentic identification of the individual freedmen. It had been challenged. It had been made up with haste and under circumstances which caused question of its correctness. It had not received judicial approval. From the first to the last it was the act of administrative officers. Had it been reported to the court and its integrity established by the judgment of the court, Congress might, indeed, have hesitated to ignore it. As an act of merely administrative officers it had no such sanction. It must be borne in mind that important rights were involved and no good reason could be urged against, or serious consequences apprehended from another investigation. Those who were entitled to be enrolled could again establish their right. Those who were not so entitled and who had got on the rolls either by mistake or fraud had no legal ground of complaint. However, we are not required to consider the reasons which induced Congress to direct that a roll be made by the Dawes Commission. Congress had the power, and, as we have decided, exercised it.

Decree reversed and case remanded with directions to dismiss the supplemental petition.

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